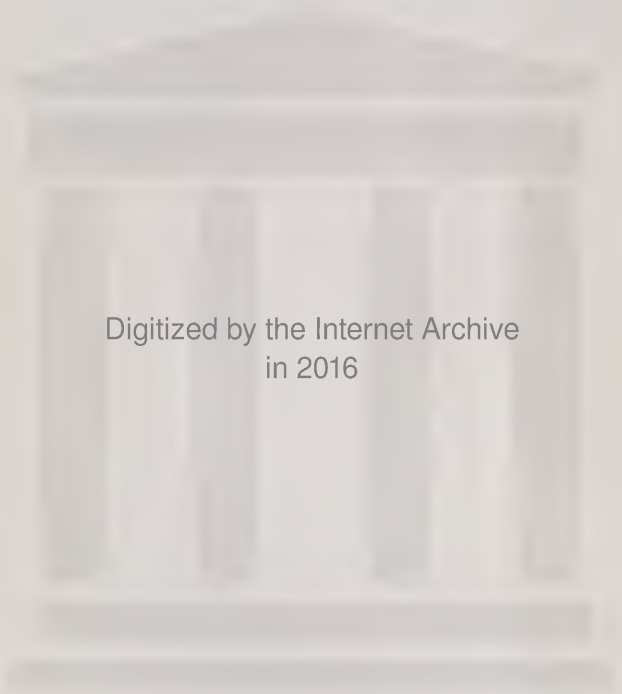

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VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1954 (2)

REPORTS

OF THE

NATIVE APPEAL COURTS

DIE STAATSDRUKKER ✦ PRETORIA ✦ THE GOVERNMENT PRINTER

G.P.-S.110281—1954-5—815.

NORTH-EASTERN NATIVE APPEAL COURT.

NDHLOVU *v.* NDHLOVU.

N.A.C. CASE No. 100 OF 1953.

VRYHEID: 30th March, 1954. Before Steenkamp, President, Ramsay and Bayer, Members of the Court.

ZULU CUSTOM.

Sisa—*Elements of—For whose benefit*—Sisa *with a minor not competent*—Sisa *with inmate of own kraal is contrary to essence and spirit of the custom.*

Summary: Plaintiff alleged that he *sisaed* a heifer with his brother when the latter was a minor and they were both inmates of their father's kraal. He alleged that the original heifer had increased to ten head of cattle. A Chief's Court gave judgment in favour of plaintiff for ten head of cattle, but on appeal to the Native Commissioner's Court the judgment was altered to one of absolution from the instance with costs, whereupon plaintiff noted an appeal to the Native Appeal Court.

Held: That it is not competent to enter into a *sisa* contract with a minor.

Held further: That it is contrary to the essence and spirit of the custom for anyone to *sisa* stock with an inmate of his own kraal.

Held further: That it is patent from plaintiff's evidence that he deposited the alleged beast with the defendant for his (plaintiff's) own benefit and that this does not accord with the custom of *sisa,* which means "to help the recipient".

Cases referred to:

Ngwabe *v.* Masoye, 1916, N.H.C. 224.
Bodwe *v.* Mampondweni, 1917, N.H.C. 36.

Statutes, etc., referred to:

Section *one* (3) of the Natal Code of Native Law of 1932.

Appeal from the Court of the Native Commissioner, Nqutu.

Steenkamp (President), delivering the judgment of the Court:—

In the Chief's Court the plaintiff (now appellant) sued the defendant (now respondent) for 10 head of cattle being *sisa* cattle and increase.

Defendant denied that any cattle had been *sisaed* to him but the Chief gave judgment in favour of plaintiff for ten head of cattle and costs and in his reasons for judgment he states that it was proved by evidence that there were *sisa* cattle which had increased to ten head of cattle as claimed.

Defendant appealed to the Native Commissioner who allowed the appeal with costs and altered the Chief's judgment to one of absolution from the instance.

Plaintiff has now appealed to this Court on the grounds that the judgment is against the weight of evidence and is bad in law.

The Native Commissioner found proved that no valid *sisa* contract had been entered into.

Plaintiff and defendant are brothers and according to plaintiff's evidence he and defendant were living at their father's kraal and after he had acquired a heifer by way of exchange from one Meshack Mbamayi he *sisaed* this heifer to his brother, the defendant, who was then 14 years of age and a boy herding

cattle. Plaintiff gives the reason for the *sisa* as being due to the fact that his cattle used to die and by giving the heifer to defendant he hoped it might increase.

It is patent from the plaintiff's evidence that he deposited the alleged beast with his brother, the defendant, for his own benefit and not for that of the recipient. This does not accord with the custom of *sisa* which means "to help" the recipient.

Plaintiff first states that he told the defendant that the beast should belong to him.

During the year 1942 plaintiff and defendant established their own respective kraals and moved their cattle to the kraals so established but it is significant that plaintiff waited until 1953 before claiming the progeny of the beast in question. He states in his evidence that he did claim the cattle from defendant in 1945 and reported the matter to their father but did not institute action.

Defendant's evidence is a denial that plaintiff ever gave him a beast or that he removed any of plaintiff's cattle to the kraal he had established during 1942.

The onus was on the plaintiff to prove the *sisa* contract and the Native Commissioner has disbelieved his evidence and that of his witness, a brother.

It is not competent for a *sisa* contract to be entered into with a minor; see the case of Ngwabe *v.* Masoye, 1916, N.H.C. 224. It is also contrary to the essence and spirit of the custom for anyone to *sisa* stock with an inmate of his own kraal (see Bodwe *v.* Mampondweni, 1917, N.H.C. 36).

It seems to make no difference whether the alleged *sisa* is to the Head of the kraal where the *sisace* resides or to another inmate of that kraal, the fact remains that if such an alleged *sisa* takes place it is contrary to the spirit of the custom of *sisa* which is defined in Section 1 (3) (*r*) of the Code.

It is most improbable that a *sisa* contract had been entered into between plaintiff and defendant and therefore we hold that the appeal should be dismissed with costs and it is ordered accordingly.

Ramsay (Permanent Member) and Bayer (Member) concurred.

Appellant in Person.

Respondent in Person.

CENTRAL NATIVE APPEAL COURT.

LENGE *v.* HLAKOTSA.

N.A.C. CASE No. 4 OF 1954

JOHANNESBURG: 7th April, 1954. Before Marsberg, President. Menge and De Beer, Members.

LAW OF CONTRACTS.

Partnership—Cancellation of partnership agreement—Onus to begin—Interdict proceedings confused with subsequent separate action (Native Commissioner's Court Rule No. 7)—Selection of one of more issues of fact to determine a case [Native Commissioner's Court Rule No. 53 (4)]—Formulated issue not pleaded—Prejudicial use of interdict proceedings.

Summary: Respondent (plaintiff in the Court below) had obtained an interdict *pendente lite* restraining defendant

(now appellant), her partner in a trading concern, from carrying on a business of which he was the sole manager, in premises placed at the partnership's disposal by respondent. In the subsequent main action for ejectment from the premises she alleged that she had cancelled the agreement of partnership because of breaches thereof by appellant, which were, however, not specified. The interdict proceedings and the main action were treated as one case, and particulars given in the former were imported into the latter; with the result that one of more alleged breaches disclosed in the interdict proceedings were selected for trial to decide the whole of the main action and the onus to answer the allegation of breaching the agreement in that respect was placed on the appellant.

Held: That the interdict proceedings and the subsequent main action are separate actions, the pleadings in the one not becoming part of the other.

Held further: That the respondent was not entitled unilaterally to terminate the partnership agreement before its termination by effluction of time.

Held further: That the respondent had no action against the appellant for the payment of a debt due to her by the partnership.

Held further: That inasmuch as the Native Commissioner had purported to try the cause whether the partnership agreement had been breached by the appellant, the onus to begin rested on the respondent.

Held further: That the costs of interdict proceedings pending a decision in the subsequent action should have been costs in the cause.

Appeal from the Court of Native Commissioner, Johannesburg.

Menge, Permanent Member (delivering judgment of the Court):—

The proceedings in this matter can be outlined as follows: Plaintiff (now respondent) carried on business as a general dealer at Stand No. 3675, Orlando, until 1st April, 1951, from which date defendant (now appellant) commenced trading on the stand. This was in terms of an agreement entered into between plaintiff and defendant on the 30th April, 1951. According to this agreement the parties concluded a partnership which was to last for five years. Plaintiff received a 5 per cent share in the profits and losses. Defendant was to be solely in control. He had to pay plaintiff £250 in her personal capacity; and he was to be personally liable for the debts due when he took over the business. Any default on defendant's part or any act on his part which would prejudice defendant's tenancy of the stand would entitle plaintiff to cancellation of the agreement and the ejectment of defendant. Finally the agreement provides that the partnership must pay plaintiff £7. 10s. for the use of the shop and that it must also pay half the municipal rates.

In July, 1951, defendant began to experience some difficulty meeting his commitments towards plaintiff under this agreement and suggested that if no other way out is possible the partnership be terminated. In reply he was asked to submit terms as regards cancellation of the agreement, but nothing further was done. Defendant was, however, granted an extension and was also told that he should pay half the municipal rates. Eighteen months later he was asked for a statement of account. This was not furnished and for this reason and by reason of complaints stated to have been made by the City Council, plaintiff on the 19th February, 1953, terminated the agreement and advised defendant that she was suing for ejectment.

On the 25th April, 1953, plaintiff applied for an interdict restraining defendant from entering the premises, carrying on business there or removing the assets pending the result of an action she is bringing. In her supporting affidavit she alleges that she cancelled the agreement by reason of defendant's failure to furnish an account of the business, and because he had, contrary to the licensing requirements, allowed persons to sleep in the shop; also because he had failed to pay half the municipal rates. The affidavit further alleges that despite her cancellation of the agreement the defendant refuses to vacate the shop and continue to trade therein to her detriment.

A rule *nisi* was granted on the 28th April serving as an interim interdict. The return day was the 6th May, 1953.

On the same day summons was issued. This alleges that plaintiff cancelled the agreement of partnership on the 19th February, 1953, by reason of defendant's breach of the agreement, and that notwithstanding demand, defendant has failed to render an account of the business and fails to vacate the premises. It asks for the ejectment of defendant and for a statement and debatement of account. No particulars of the alleged breach of the agreement are given.

On the 5th May, 1953, defendant replied by affidavit to the application for an interdict saying that he had not been called upon to furnish a statement of account; that he was willing to do so at any time, that no one had been using the shop as sleeping quarters; that he had paid the municipal rates and that termination of the agreement was not justified. He also denied that his continued trading was prejudicing plaintiff and that he had a good defence to the action instituted by plaintiff.

On the 6th May, 1953, the return date of the rule *nisi*, the action also commenced, but the record merely indicates that the matter was postponed by consent to the 20th May, 1953.

On the 20th May, 1953, after further affidavits concerning the rule *nisi* had been filed, the matter was again postponed; but the following note of the Native Commissioner appears on the record: "Interim interdict to remain in force pending hearing of final judgment in case but execution in terms thereof to be stayed until Court grants final judgment." One does not know what this means, for obviously there can be no "execution in terms thereof" having regard to the wording of the interdict. Counsel for the appellant was equally at a loss as to the meaning of this order.

On the 20th May, 1953, a plea was filed wherein defendant denies that he has breached any terms of the agreement and that plaintiff was entitled to cancel it. He tendered a statement of account. This was handed in at the resumed hearing on the 17th June, 1953, and shows that trading was at a loss.

At this hearing a different Additional Native Commissioner presided; and he gave a ruling at plaintiff's instance "that the determination of the issue as to whether defendant did pay half the municipal rental, rates and charges in terms of the partnership agreement could dispose of the case"; and that "the onus rests on defendant to prove that he did fulfil this obligation."

Thereupon lengthy evidence was heard over a number of court days with postponements in between. A counterclaim and an alternative plea was filed; and these were replied to, but these replies were rejected by the Court as unsatisfactory. A fresh plea to the counterclaim was later filed and also a fresh replication to defendant's alternative plea. Thereupon the alternative plea was struck out as disclosing no defence and similarly, defendant's counterclaim was struck out as disclosing no cause of action.

Two months later amendments were filed to the alternative plea and to the counterclaim. The alternative plea, as thus amended, was to the effect that the partnership agreement was

of no force and effect as the consent of the City Council had not been obtained: alternatively that as plaintiff was herself a party to the breach alleged she could not claim under the agreement.

The counterclaim, as it finally stood, was to this effect: that defendant purchased a 95 per cent share of the business and that plaintiff entered into partnership with him, retaining a 5 per cent share therein; that defendant's cancellation of the partnership agreement was unlawful; and, alternatively, that the business has become unlawful as a result of plaintiff's failure to obtain the City Council's sanction of the agreement: Further that defendant was all along unaware of this and that he claims, as a result, £2.000 damages. There is also an alternative counterclaim to the effect that the partnership agreement has been cancelled by the City Council due to the fault of plaintiff; that in consequence he was unable to carry on the business and that, as a result, he claims £2,000 damages.

It is not clear what became of these amendments. On the 14th September, 1953, when they were handed in, the Court ruled that "In view of the fact that the plea that agreement was void has been struck out, the Court now rules that the trial of following be resumed, viz. issues as to whether defendant failed to pay one-half of the municipal rental, rates and charges in terms of clause 8 of the partnership agreement; or whether the defendant is liable personally or whether clause 8 was not amended by subsequent agreement". It seems that this ruling in effect struck out the counterclaim and also the alternative plea, except for the alternative mentioned therein. Nevertheless, on the 23rd September, 1953, plaintiff filed a plea to the amended counterclaim. In this plaintiff denies that cancellation of the agreement was unlawful and pleads that the allegation that plaintiff had unlawfully cancelled the agreement and that defendant was, in consequence, dispossessed of the business disclosed no cause of action; also that the alternative counterclaim disclosed no cause of action.

After defendant had completed his evidence and closed his case on the issue formulated by the Native Commissioner, plaintiff gave and led evidence, during the course of which she admitted that defendant had stated that the business could not afford to pay its share of the municipal rates. Plaintiff's evidence commenced on the 14th September, 1953, and ended on the 18th November, 1953. Meanwhile further developments had been taking place concerning the interdict. Defendant, it appears, had continued to trade in spite of the interdict, being under the impression, rightly or wrongly, that the parties had agreed to suspend its operation. Plaintiff, however, on the 24th July, 1953, asked for an amendment of the interdict so as to enable the Messenger of the Court to take charge of the assets in the shop. A rule *nisi* embodying this amendment and operating as an interim order was granted on the 25th July, 1953, returnable on the 29th July, 1953. On the 7th August, 1953, after an adjournment from the 29th July, 1953, the order authorising the Messenger of the Court to take the assets into his custody was confirmed with costs. The goods had already been so taken in custody on the 25th July, 1953. On the 21st August, 1953, an appeal was noted against the rule granted on the 25th July, 1953. To this matter we will revert later.

At the close of the evidence on the main action on the 18th November, 1953, the Court recorded the finding that "defendant had breached the partnership agreement in that he failed to pay half the municipal rental on behalf of the partnership". This, the Court held, disposed of both the counterclaim and alternative claim, though why it should dispose of the latter is not clear. Judgment was thereupon given for plaintiff as regards the ejectment and as regards the tendering of a statement of account, although a statement for the year ended 31st December, 1952. had in fact been tendered and furnished.

On the counterclaim judgment was entered for plaintiff.

The above is a brief recapitulation of these somewhat complicated proceedings.

The defendant has appealed against this whole judgment, mainly on the ground that the onus had been wrongly placed on defendant. This contention is well founded. But counsel argued the appeal solely on the point that the share of the municipal rates was a partnership debt, for which defendant was not personally liable. That is also well founded.

On the pleadings as they stood on the 17th June, 1953, when the matter came before the Native Commissioner, it is quite evident that the onus of proof rested on plaintiff. The plaintiff alleged a breach of agreement. She gave no particulars as to what constituted this breach. Consequently she had to prove the breach, the more especially as in a partnership case the rule is that an agreement which has not expired by effluxion of time can only be cancelled for very sound reasons. But here the summons does not even disclose a cause of action. The plaintiff has no right to cancel the agreement. For that she requires an order of court. Wille and Millin's well-known text book makes this clear. The reasons why this is so are given by Pothier in his Treaties on Partnerships, Chapter VIII, Section 5; but ultimately, it rests on the axiom that no person can be the judge in his own cause. Furthermore, on plaintiff's submission the Native Commissioner formulated an issue (concerning the payment of half the municipal rates) which was not put forward in the pleadings. In his reasons the Native Commissioner states: "When I gave my ruling the plea conveyed to me that defendant *inter alia* stated that he had paid half the municipal rental . . ." That is of course a wrong conception of the function of pleadings. The agreement lays a number of obligations on defendant, both as an individual and as a managing partner. Plaintiff did not indicate in which of these defendant had failed; consequently it was not for defendant to justify himself, nor was it the Native Commissioner's duty to take any one of these obligations at random and then to ask defendant to show that he had complied with it. The obvious conclusion is that the Native Commissioner allowed himself to be influenced by the issues involved in the interdict. But that was an entirely different issue, not connected with the pleadings before him and not before the Court. Yet the Native Commissioner seems to have treated the interdict issue as part and parcel of the same case, for not only are the papers of both actions in one and the same case cover, numbered 243/53, which is contrary to the rules, but on page 104 he describes the original affidavit of plaintiff in the interdict action as "further particulars" in the main action.

Furthermore, the issue which the Native Commissioner thus extracted and placed before the Court does not disclose a cause of action. (The Court's ruling is quoted in the summary above). The defendant could there and then have admitted non-payment and it would not have carried the matter further. In the first place the partnership may not have been in a position to pay these rates—and indeed the evidence subsequently adduced by both sides is strongly to that effect. Secondly, even if the partnership could have paid these rates the failure to pay them does not make the defendant personally liable to plaintiff.

So, to sum up, the summons discloses no cause of action; the onus was misplaced; an issue was formulated which was not pleaded; that issue disclosed no cause of action, and the evidence which was led showed that defendant even as sole executive of the partnership did not breach the contract inasmuch as it showed that funds were not available to pay the municipal charges.

These are the circumstances in which judgment was granted in favour of plaintiff. The issue was at first a very simple one. Through giving an erroneous ruling at the outset the entire subsequent proceedings took a wrong and unnecessary course.

The appeal against the judgment on plaintiff's claim is allowed with costs and the Native Commissioner's judgment is altered to one of absolution from the instance with costs.

As regards the counterclaim and alternative pleas, these were abandoned in argument before us.

Reverting now to this matter of the interdict, it is surprising that this was ever granted since the main essential of that procedure, namely, an allegation that the respondent is causing or about to cause the applicant some injury or damage which is irreparable by any other remedy, was not apparent. Why the Court saw fit to condemn the defendant to the heavy damages which the closing of his business must have caused him before he had been given a chance to defend his case—nay before issue of summons even, is hard to understand.

Nevertheless there was no appeal against this order. In fact, an extension of the order was agreed to by defendant even though he strenuously opposed the original granting of the order.

The appeal noted on the 21st August, 1953, was against the amendment, which authorised the Messenger of the Court to seize the goods. Why this appeal was noted is not clear. It could not have made any difference to defendant, having regard to the original order, whether or not the Messenger takes charge of the stock in trade. Besides, defendant did treat the original interdict as suspended and can hardly blame plaintiff for tightening it up in consequence. That appeal did not have much prospect of success. As it is, no object can be served in pursuing it at this stage. It did not come before us at the proper time when a decision thereon would have still been effective in favour of one or other of the parties. To-day no judgment that we can give in the matter of this interdict can have any force or effect because the interdict automatically comes to an end by virtue of the main case having been finally disposed of. Indeed, counsel did not press the appeal except in regard to the costs incurred. But it is important to notice why the appeal did not come before us at the proper time. In terms of Rule 10 the record should have been transmitted to this Court within fourteen days of the receipt of notice of appeal; but this was not done. The record with reasons for judgment, dated 31st August, 1953, was only despatched to this Court on the 24th December, 1953, as part and parcel of the main action numbered 243/53. The Clerk of the Court either overlooked Rule 7 of the Native Commissioner's Court Rules, or misinterpreted it. The summons in what has for convenience been referred to as the main action did not in any way relate to the then pending action on the interdict. The parties were the same, but not the cause of action. The two matters, as we have already pointed out, should have been recorded and dealt with as separate cases. It is strange that the defendant took no steps to have the appeal brought before us. He could have done so under Rule 26. In any case the appeal must fail save as to the question of costs because, the main case having been finally disposed of, there no longer exists any obligation or prejudice which this Court should or could reverse or remove. But the order of the Native Commissioner on the 7th August, 1953, in which costs of the confirmatory order were awarded to the applicant is wrong. The costs should have been costs in the cause, and it is ordered acordingly. To this extent only the appeal on the interdict succeeds.

In the result then the appeal against the judgment of the Native Commissioner in the main action is allowed with costs and the judgment is altered to read: "Absolution from the instance with costs".

The appeal on the interdict succeeds, with no order as to costs, only to the extent that the order of the Naive Commissioner as to costs on the 7th August, 1953, is altered to read: "Costs to be costs in the cause".

Marsberg (President) and De Beer (Member), concurred.

For Appellant: Adv. G. Alexander instructed by Mr. E. Gordon.

For Respondent: Adv. D. Spitz instructed by Messrs. Helman and Michel.

CENTRAL NATIVE APPEAL COURT.

MATHENYANE *v.* MATHENYANE AND KOEE.

N.A.C. CASE No. 5 OF 1954.

JOHANNESBURG: 8th April, 1954. Before Marsberg, President, and Menge and De Beer, Members.

LAW OF PERSONS.

Children—Powers of Courts in matters of custody of children—Effect of pleadings on onus to begin.

Summary: Plaintiff (now appellant) had unsuccessfully sued his former wife, from whom he had been divorced in 1951, and her guardian for the custody of his children. He relied solely on paternity and legal guardianship and did not allege or lead evidence to the effect that the award would be in the interests of the children.

Held: That questions of custody of children cannot be decided purely on principles of legal guardianship and that the Court exercises supervisory powers in the interests of children. Respondent should have alleged and proved that the award would be in the interests of the children.

Held further: That as the Native Commissioner had granted absolution from the instance on a wrong premise, namely imposing on plaintiff an onus of adducing proof which the pleadings did not justify; and having regard at all times to the paramount consideration of the interests of the children, he should be given an opportunity to adduce proof as to the effect of the award which he seeks, on the welfare of the children.

Appeal from the Court of the Native Commissioner, Vereeniging.

Menge (Permanent Member), delivering judgment of the Court:—

In this matter, as finally put in issue, plaintiff claimed an order awarding him the custody of two children.

The particulars of his claim allege:—

(*a*) That he contracted a civil marriage with first defendant in 1951;

(*b*) that he is the father and natural guardian of the children born out of this marriage;

(*c*) that this marriage was dissolved in 1953;

(*d*) that defendants are in wrongful and unlawful possession and custody of the children.

Defendants in their plea admit these allegations save that they deny the paternity and guardianship of plaintiff and that they are in wrongful and unlawful possession and custody of the children. The plea alleges also that custody should be granted to first defendant and it asserts that the defendants maintain the children.

At the hearing plaintiff's attorney claimed that the onus to begin rested with defendants and he closed his case without leading evidence. The attorney for defendants therefore asked for absolution from the instance which was granted.

Plaintiff has appealed mainly on two grounds, viz.—

1. That in the matter of paternity and guardianship the presumption *pater est quem nuptiae demonstrant* was in his favour.

2. That plaintiff is in law entitled to the custody of the children in the absence of an order of a competent court depriving him of such custody and that consequently the onus of disproving his rights rested on defendants.

There was no appearance by or for the respondents.

The Native Commissioner in his reasons for judgment, whilst conceding that the presumption of law as to paternity throws the onus to adduce proof on the defendants, considers that the denial of the defendants that they are in wrongful and unlawful possession and custody of the children can be construed as meaning that the children are not in their possession at all and that therefore some evidence of their whereabouts was required from plaintiff. If that were so the plea would be bad by reason of evasiveness. The plea does not deny the defendant's custody of the children. It only denies the alleged wrongfulness and unlawfulness. Apart from the fact that this flows necessarily from the ordinary rules of pleading, the further statement that "defendants jointly and severally maintain the children" makes it quite clear.

On the question of paternity the onus did not rest upon the plaintiff, nor did it rest on him to prove that the children were in the defendant's custody. For these reasons the Native Commissioner's judgment cannot be upheld.

But there is a further consideration which both parties as well as the Native Commissioner seem to have lost sight of. Questions of custody of children cannot be decided purely on principles of guardianship. The Court exercises supervisory powers and orders that which is in the interests of the children. For instance, a court would be reluctant to deprive a mother of the custody of a child of two years even though her divorced husband is the legal guardian. If the defendants have in fact the custody of the children which the plaintiff claims, he can only deprive them of that custody by alleging and proving that it would be in their interests if custody were awarded to him. This the plaintiff has failed to do; but, having regard again to the interests of the children he should be given an opportunity to amend the summons in this regard and to adduce evidence to show that it would be in the interests of the children's welfare and to their advantage if he had the custody.

The plaintiff therefore succeeds substantially in his appeal. The appeal is allowed with costs. The judgment of the Native Commissioner is set aside and the case is returned for further attention.

Marsberg (President) and De Beer (Member) concurred.

For appellant: Mr. R. Michel, of Messrs. Helman and Michel.

For respondent: In default.

CENTRAL NATIVE APPEAL COURT.

MVAMBO *v.* SIBIYA.

N.A.C. CASE No. 6 OF 1954.

Johannesburg: 8th April, 1954. Before Marsberg, President, Menge and De Beer, Members.

LAW OF PROCEDURE.

Practice and Procedure—Rescission of default judgment—"Wilful Default"—Whether granting of application for condonation of late filing of application is appealable—Native Commissioner's Court Rules 74, 81 (2) *and* 84 (5).

Summary: The Native Commissioner had rescinded a default judgment, holding that the default was not wilful, and had condoned the delay in bringing the application for rescission. The respondent contended that these orders were not appealable.

Held: That the order of the Native Commissioner extending the time limit within which a rescission of a default judgment may be applied for, is not interlocutory but a final judgment in a separate proceeding falling to be dealt with, for purposes of appeal, under Native Commissoner's Court Rule No. 81 (2) (*a*).

Held further: That the respondent's default was wilful and barred relief.

Cases referred to:

Hendriks *v.* Allen, 1928, C.P.D., 519.
Ha nard *v.* Estate Dewes, 1930, O.P.D., 119.
Chedburn *v.* Barkett, 1931, C.P.D., 423.

Statutes etc., referred to:

Native Commissioners' Courts Rules Nos. 74, 81 (2) and 84 (5).
Section 15 of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Johannesburg.

Menge (Permanent Member), delivering jundgment of the Court:—

This is an appeal against an order of the Native Commissioner, Johannesburg, rescinding a default judgment and condoning the delay in bringing the application for rescission. Rules 74 and 84 (5) of the Native Commissioners' Courts rules are in question.

The position, briefly, is that the appellant had obtained judgment by default on a claim against the respondent for damages for seduction. The default judgment was granted on the 9th April, 1952. The appellant was awarded £25 as damages for the seduction plus £15 in respect of loss of wages. A writ of execution was issued on the 10th April, 1952; but on the 29th April, 1952, the Messenger entered a *nulla bona* return. Thereupon garnishee proceedings were taken which came to the respondent's notice towards the end of January, 1953; and pursuant thereto his employers, the South African Railways and Harbours Police, started making deductions from respondent's salary. He thereupon consulted his attorney with the result that on the 29th May, 1953, the proceedings which form the subject of this appeal were instituted.

The respondent in his application to the Court below denies having been served with the summons and writ of execution in the case and sets up the defence that the appellant was not a virgin at the material time.

The Native Commissioner heard evidence and thereafter, on the 13th January, 1954, rescinded the default judgment and ordered the respondent "to pay all wasted costs on attorney and client scale including costs of application for rescission".

Against this judgment the appellant now appeals on the grounds that the Native Commissioner erred in condoning the delay on the part of the respondent in making his application for rescission, and that the Native Commissioner was wrong in holding that the default was not wilful.

Mr. Mandela who appeared before us for the respondent took the preliminary point that the Native Commissioner's order rescinding the judgment, being purely interlocutory, is not appealable. He referred us to the recognised authorities on this point. Actually this is an exception and should have been dealt with as provided in Rule 14 of this Court. However, Mr. Smits, on behalf of the appellant contended that whilst normally such orders are not appealable, section *fifteen* of the Native Administration Act, No. 38 of 1927, makes a distinction in so far as this Court is concerned.

In our view neither of these contentions is really in point. As to section *fifteen*, this is an empowering clause, but whether it empowers this Court to disregard established rules of law is extremely doubtful. As to the respondent's contention that the judgment is not appealable, this is not in point because we are not dealing simply with a rescission of a default judgment, but mainly with an order of the Native Commissioner extending the legally permitted period within which rescission can be applied for—the order attacked in the first of the grounds of appeal. Rule 74 (1) requires that an application for rescission must be made within one month after the judgment has come to the notice of the applicant. Under rule 84 (5) the Court may extend this time limit. In this case, the application for rescission should have been made during May, 1952; but is was only made in June, 1953, thirteen months after the respondent had lost his right to apply for recission. It is this order, viz. whether the Native Commissioner was right in extending the one-month time limit to fourteen months, which we have to consider, and that is not an interlocutory order. It is a final judgment in a separate proceeding and falls to be dealt with, for the purposes of appeal, not under paragraph (*b*) of Rule 81 (2) of the Native Commissioners' Court rules, but under paragraph (*a*). The reason is that it is not an order made in the original seduction action. That action was by statute kept alive for a period of one month after it came to the knowledge of the respondent for the purposes of rescission proceedings, but after that period had elapsed no order of rescission was possible "in such suit or proceeding" [to quote from paragraph (*b*)]. An entirely new proceeding had to be, and was, brought by way of application under Rule 84 (5), and it is the Native Commissioner's judgment thereon that we are concerned with. That judgment is appealable.

The question to decide then is whether that application was properly granted. This depends in the first place on whether or not the respondent was in wilful default; because if he was the Native Commissioner would have been debarred by Rule 74 (5) from granting rescission, and consequently an application for condonation of late noting of the application for rescission must also fail.

The Native Commissioner has found, rightly we think, that the respondent had been personally served with the summons, and that the writ had been served on his wife. In other words the Native Commissioner was satisfied that the respondent had knowledge of the proceedings. But, the Native Commissioner does not consider that the default was wilful in that the respon-

dent has, or thinks he has, a good defence, and was not willing to have judgment entered against him. He relies on Hitchcock *v.* Raaff, 1920, T.P.D. 366. This decision was dissented from in subsequent cases—see Hendriks *v.* Allen, 1928, C.P.D., 519; Hainard *v.* Estate Dewes, 1930, O.P.D., 119, and Chedburn *v.* Barkett, 1931, C.P.D., 423. The position as laid down in these cases can be summarised as follows: A default is wilful if the defaulter knows what he is doing, intends what he is doing, is a free agent and is indifferent as to what the consequences of his default may be. So long as the defaulter is a free agent and knows that he has been summoned, his default is wilful if he neglects to appear, no matter what his motive may be.

Bearing these principles in mind this is clearly a case of wilful default. But even on the test laid down in Hitchcock's case the Native Commissioner seems to have erred. The respondent on 29th May, 1953, for the first time indicated that he had a defence. There is nothing to show that he was mindful of that defence at the time of his default. Also, it seems clear from the applicant's conduct that he was at no time unwilling to have judgment given against him. He ignored the summons; he ignored the writ which was served on his wife, and of which he must be presumed to have had knowledge; and in January, 1953, he ignored his employer's intimation as regards the garnishee proceedings. It was only when deductions came to be made from his salary on the 30th April, 1953, that he bestirred himself in the matter—clearly a most striking example of a wilful default.

The Native Commissioner also excuses the respondent on the ground that he only became aware of his right to apply for rescission after he had seen his attorney at the beginning of May, 1953, and that he had in the meanwhile placed matters in the hands of the Welfare Officer of the Native Commissioner's office, whose advice he was awaiting. We are not impressed with these grounds. The first is no excuse because the applicant could have attended to the matter earlier; and as regards the second, it is no part of the Welfare Officer's duty to intercede on respondent's behalf in legal proceedings taken against him, and it was quite unreasonable on the respondent's part to expect him to do so.

The appellant must succeed on his first ground of appeal, namely that the respondent should not have had his delay in applying for rescission condoned. Consequently the rescission of the judgment by the Native Commissioner becomes an irregularity which this Court must rectify. The appeal is, therefore, allowed with costs and the judgment of the Native Commissioner is altered to read "The application is dismissed with costs."

Marsberg (President) and De Beer (Member) concurred.

For Appellant: Mr. B. A. S. Smits.

For Respondent: Mr. N. Mandela of Messrs. Mandela & Tambo.

NORTH-EASTERN NATIVE APPEAL COURT.

KHUMALO *v.* INSULEZIBENSI UBOPUMUZE SWARTKOP NATIVE COMPANY.

N.A.C. CASE No. 1 of 1954.

PIETERMARITZBURG: 12th April, 1954. Before Steenkamp, President, Ramsay and Rossler, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Native Commissioner's Court has no jurisdiction in respect of action against a limited liability company.

Summary: Plaintiff, a Native, sued the Defendant, a limited liability company, the shareholders and directors of which are all Natives. The Native Commissioner dismissed the summons, holding that his Court has no jurisdiction in respect of a party which is a limited liability company. Plaintiff appealed.

Held: That the Native Commissioner's Court had no jurisdiction to hear and determine the instant case in which one of the parties is a limited liability company.

Cases referred to:

Bantu Fuel and Coal Co. (Pty.), Ltd., *v.* Edwin Mothlodi, 1 N.A.C. (C) 7.

Gumede *v.* Bandhla Vukani Bakathi, Ltd., 1950 (4), S.A., 560 (NPD).

Dadoo, Ltd., and others *v.* Krugersdorp Municipal Location, 1920, A.D., 530.

Statutes etc., referred to:

Companies Act, 1926.
Sections 17 (4) and 35, Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff (now appellant) sued the defendant (now Respondent), a limited liability company.

It is not necessary to set out the particulars of claim as defendant's plea is in fact a plea in bar in that the Native Commissioner's Court had no jurisdiction to hear and determine a case in which both the parties are not Natives.

The defendant company is duly registered in terms of the Companies Act of 1926, and there was filed of record a certificate by the Registrar of Companies to the effect that the Company is limited.

The Native Commissioner upheld the plea in bar and dismissed the summons with costs.

An appeal has now been noted to this Court on the grounds that the Native Commissioner's judgment was bad in law in that there is authority for saying that a Native Commissioner's Court has jurisdiction to try such action and the Native Commissioner was bound to follow such authority.

Counsel for Appellant has quoted the case of *Bantu Coal and Fuel Co. (Pty.), Ltd.*, v. *Edwin Motlhlodi*, 1 N.A.C. (C) 7.

In the Court below he referred to Stafford, page 20, where it is stated that a trading concern of Natives registered under the Company Laws with limited liability was granted judgment in the Native Commissioner's Court and confirmed in the Native Appeal Court in the case of *Bantu Coal and Fuel Co. (Pty.) supra.*

In that case the question of jurisdiction was not raised in the Court below nor in the Native Appeal Court and therefore the argument that had the Native Appeal Court thought it had no jurisdiction to try a case between a Native and a Company it would have made reference to it in the judgment cannot be entertained as it might never have entered the minds of the members of the Court that there might be a doubt concerning the jurisdiction.

The issue now comes before this Court for a crisp decision as to whether according to the definition of "Native" in the Native Administration Act, a limited liability Company whose members are all Natives, fall within the category of the definition of a Native.

"Native" is defined in Section 35 of the Native Administration Act as follows:—

> "Native" shall include any person who is a member of any aboriginal race or tribe of Africa."

The rest of the definition is not material in the instant action.

The Natal Provincial Division of the Supreme Court has already in the case of *Gumede* v. *Bandhla Vukani Bakathi, Ltd.*, 1950 (4), S.A., 560 (N.P.D.), decided that a Magistrate's Court has jurisdiction to try a case between a Native and a limited company where shareholders and directors were Natives. According to Section 17 (4) of Act No. 38 of 1927, a Magistrate's Court has no jurisdiction in respect of any civil suit between Native and Native. In the appeal heard by the Natal Provincial Division it was held that a limited company does not fall within the definition of a Native and therefore only a Magistrate's Court *vis a vis* a Native Commissioner's Court has jurisdiction to hear the case.

This Court agrees with that decision especially in view of the remarks made by the Chief Justice in the case of *Dadoo, Ltd., and Others* v. *Krugersdorp Municipal Location*, 1920, A.D., 530, wherein it is stated that a registered company is a legal *persona* distinct from the members who compose it.

We therefore agree with the Native Commissioner that his Court had no jurisdiction to hear and determine the case and the appeal is accordingly dismissed with costs.

Ramsay (Permanent Member): I concur.

Rossler (Member): I concur.

For appellant: Mr. L. Simon, of Messrs. Leslie Simon & Co.

For Respondent: Mr. S. N. Roberts, of Messrs. R. Tomlinson, Francis & Co.

NORTH-EASTERN NATIVE APPEAL COURT.

ZIQUBU *v.* ZIQUBU.

N.A.C. CASE No. 102 OF 1953.

PIETERMARITZBURG: 13th April, 1954. Before Steenkamp, President, Ramsay and Rossler, Members of the Court.

LAW OF DELICT.

Damages—Defamation—Repeating verdict of witchdoctor—Privilege—Publication in excess of what is reasonably required by the exigency of the occasion—Proof of malice.

Summary: After defendant's hut was struck by lightning, he consulted a witchdoctor who pointed out plaintiff as being responsible for sending the lightning. Defendant repeated the verdict firstly to an *ibandhla* at a dipping tank, secondly to their employer and thirdly to an Induna after the conclusion of the hearing of a case. Plaintiff sued defendant for

£50 damages for defamation. The Native Commissioner entered a judgment of absolution from the instance, whereupon plaintiff noted an appeal.

Held: That defendant so believed in the verdict of the witch-doctor that there was no doubt in his mind that plaintiff was a wizard and he expressed this in his statement to their employer.

Held: That if there was a duty on the part of the *ibandhla* to inform the employer what the verdict was then there might be privilege.

Held further: That privilege is exceeded if the publication is in excess of what is reasonably required by the exigency of the occasion, and that when defendant persisted in the statement to other people malice was apparent and once it is found that malice existed, then the defendant is liable in damages.

Cases referred to:

M.ya *v.* Miya and others, 1947, N.A.C. (T. & N.), 108.

Appeal from the Court of the Native Commissioner, Estcourt.

Steenkamp (President), delivering the judgment of the Court:—
Application is being made for the condonation of the late noting of this appeal.

The appeal was noted in time but the Notice of Appeal was not stamped until after the time prescribed for the noting of an appeal had expired.

The applicant has a good prospect of success in his appeal and therefore the condonation is granted.

The Plaintiff (now Appellant) sued the Defendant (now Respondent) for £50 damages for defamation.

The Assistant Native Commissioner entered an absolution judgment with costs and against that judgment an appeal has been noted to this Court on the following grounds:—

"1. It is submitted that there is ample evidence upon the record from the evidence of the plaintiff and his witnesses—

(*a*) to support the claim in plaintiff's summons that the defamatory words complained of were spoken by the defendant on several unprivileged occasions;

(*b*) to support the claim that plaintiff was and still is now looked upon with fear and suspicion by other Natives in the area; is boycotted and shunned and as a result thereof has suffered the damages claimed.

2. There is upon the evidence as a whole no reason, with submission, for the Learned Judicial Officer in the above Honourable Court to have granted absolution from the instance in preference to plaintiff's prayer.".

The plaintiff's allegations in his summons are as follows:—

"1. The parties hereto are Natives as defined by Act No. 38 of 1927.

2. On or about 7th March, 1953, defendant, in the presence of Mr. P. Boshoff and others at Krusiontein said of and concerning plaintiff, "Jubhele Ungumtakati—Wahlisela izulu mzini wami", which words were intended to convey that plaintiff is a wizard and sent lightning to strike defendant's kraal.

3. On or about 20th March, 1953, and at Madhlala's kraal (near Mooirivier) defendant, in the presence of Mahovoza Madhlala, Mpini Xaba, Hatshana Sokela, Lumbo

Myeza and others, said of and concerning plaintiff, "Jubhele Ungumtakati—Wahlisela izulu mzini wami", which words were intended to convey that plaintiff is a wizard and sent lightning to strike defendant's kraal.

4. On diverse other dates and at diverse other places defendant has made the same statement with the intent to convey the same meaning and continues to do so.

5. As a result of defendant's remarks, plaintiff is now looked upon with fear and suspicion by other Natives in the area; plaintiff has become boycotted and shunned; Natives will not call at his kraal and his children are treated as "Mtakatis" and as a result his plaintiff's life has become unbearable.".

The facts are that defendant's hut was struck by lightning and, following a meeting of a "Bandhla" which decided that a witchdoctor be consulted, he consulted a witchdoctor to find out who was responsible for sending the lightning. The witchdoctor, according to defendant's evidence, pointed out the plaintiff. Plaintiff avers that he was not a party to the agreement to consult a witchdoctor but defendant alleges that plaintiff was one of those who agreed to it. Assuming that plaintiff agreed to this, then the question arises as to whether defendant was justified in disseminating the verdict of the witchdoctor firstly at the dipping tank, secondly, to their employer, Mr. Boshoff, and thirdly, to the Induna after the conclusion of the hearing of the case.

Although the evidence of the Native witnesses contains discrepancies there is no reason to doubt the veracity of Mr. Boshoff, an independant European witness, who testifies that defendant said: "Jubhele (plaintiff) is a witchdoctor. He put the lightning in my house." Mr. Boshoff was informed that the witchdoctor had said so but the way we understand this evidence by Mr. Boshoff is that defendant so believed in the verdict of the witchdoctor that there was no doubt in his mind that plaintiff was a wizard and expressed this in his statement to Mr. Boshoff. If it were merely a case that there was a duty on the part of the *ibandhla* to inform Mr. Boshoff what the verdict was then there might be privilege but as mentioned by McKerron on page 231 of his book "The Law of Delict" (third edition) privilege is exceeded if the publication is in excess of what is reasonably required by the exigency of the occasion.

The evidence given is conflicting but one thing stands out clearly and that is that after the parties had appeared before the Chief's Induna the defendant persisted in shouting out that the plaintiff was a wizard and responsible for the lightning and that the witchdoctor had said so.

In our opinion the first occassion, namely at the dipping tank, might have been privileged as the defendant only informed the gathering what the witchdoctor had said and the matter should have ended there but when he persisted in the statement to other people malice was apparent and once it is found from the evidence that malice existed, then the defendant is liable in damages.

There was no occasion after the witchdoctor's verdict had been communicated to the "Bandhla" for the defendant to have reiterated it elsewhere.

The Assistant Native Commissioner relied on the case of Miya *v.* Miya and Others, 1947, N.A.C. (T & N), 108, in which the plaintiff consented to a smelling out ceremony and the Court held that he could not succeed on a claim for damages for defamation, but in that case the Court applied the maxim *Volenti non fit injuriae* because only on one occasion did the defendant disseminate the verdict of the witchdoctor and that was to the people who agreed and contributed towards the expenses to consult him. The matter ended there and defendant did not repeat

the verdict. In the instant appeal he repeated on several occasions the edict of the witchdoctor to people who were not parties to the agreement and therefore the cases are distinguishable.

Although the claim is for £50, we are of opinion that this is too high and an amount of £25 with costs would meet the case.

In the circumstances the appeal is allowed with costs and the Assistant Native Commissioner's judgment is altered to read:—

"For plaintiff for £25 and costs."

Ramsay (Permanent Member) and Rossler (Member), concurred.

For Appellant, Adv. O. A. Croft-Lever instructed by Mr. C. H. Jerome.

For Respondent: Adv. J. H. Niehaus instructed by Messrs. Hellett & De Waal.

NORTH-EASTERN NATIVE APPEAL COURT.

MCUNU *v.* **NDHLOVU.**

N.A.C. CASE No. 4 OF 1954.

PIETERMARITZBURG: 13th April, 1954. Before Steenkamp, President, Ramsay and Rossler, Members of the Court.

LAW OF DELICT.

Damages—Assault—Quantum of damages.
Practice and Procedure—Two distinct claims in summons—Judgment of absolution from the instance on claim not sufficiently proved.

Summary: Plaintiff, an old man of about 60 years, was severely assaulted by defendant, a young man of 25 years of age. Plaintiff claimed (*a*) £50 damages for assault, and (*b*) £40 cash lost during the period plaintiff was unconcious following on the assault.

The Native Commissioner granted judgment for plaintiff for £5 for the assault with no order as to costs. He entered no judgment on the claim for loss of money.

Held: That the evidence of plaintiff concerning the nature and extent of his injuries was not denied and it is manifest that he, an old man, received severe injuries from an able-bodied young man of 25 years of age.

Held further: That the assault was unjustified and even accepting that the plaintiff had made the remark defendant alleges he did, there was no need for such an assault especially in that after they had been separated, defendant followed the plaintiff and inflicted more blows.

Held further: That an award of £5 damages would therefore appear to be grossly inadequate and that the damages should be increased to £25 and costs.

Held further: That as plaintiff might be able to bring stronger evidence that he had £40 on him when he was assaulted and

that this sum of money had disappeared as a result of the assault, the Native Commissioner should have entered an absolution judgment in respect of this claim, which in the instant action, is a claim distinct from that for damages for the assault.

Appeal from the Court of the Native Commissioner, Greytown.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff (now appellant) sued the defendant (now respondent) for (*a*) fifty pounds (£50) as and for damages suffered by appellant as the result of an assault committed by respondent and (*b*) forty pounds (£40) cash which appellant alleges in his summons he lost.

In his plea respondent admitted the assault and consented to judgment in the sum of £5 and costs to date. He, however, denied any liability in the further sum of £40 which he alleged is too remote.

The Assistant Native Commissioner gave judgment in favour of appellant for £5 for the assault with no order as to costs. There is no judgment in respect of the £40 cash which appellant alleged he lost but in his reasons for judgment the Assistant Native Commissioner states he came to the conclusion that plaintiff did not lose £40 on the day he was assaulted by the respondent.

An appeal has been lodged by plaintiff to this Court on the following grounds:—

"1. In respect of that part of the judgment awarding to plaintiff the sum of £5 as damages for assault, the appeal is based on the grounds that having regard to plaintiff's age, the unprovoked and persistent nature of the assault upon him, and the extent of the injuries sustained by him, the sum of £5 is an inadequate award.

2. In regard to that portion of the judgment dismissing plaintiff's claim for damages in respect of the loss of £40 cash, the appeal is based on the grounds that:—

(*a*) On the evidence as a whole the Assistant Magistrate should have found that the plaintiff was in possession of this sum at the time of the assault, and that he lost this money in consequence of the assault.

(*b*) *Alternatively* the Assistant Magistrate should have held that the evidence was of such a nature that it did not warrant the granting of a final judgment in favour of defendant and in respect of this part of the claim, he should have entered a judgment of absolution from the instance."

Appellant is an old man of about 60 years of age and respondent is a young man: He gives his age as 25 years.

From the evidence there can be no doubt that the appellant had been severely assaulted by the respondent who testifies that the cause of the assault was that appellant had stated, after respondent had taxed him about walking over the mealie fields, "where did your father die". It would appear that in a previous faction fight in which appellant did not take part an uncle of the respondent had been killed. Respondent took exception to this remark and hit the appellant. Other people intervened and appellant was taken away and while he was across a certain stream respondent followed up and they fought again. What respondent really meant was that he attacked the appellant again.

Appellant's evidence concerning the injuries is that the bones in his left hand were broken. There were also broken bones in the right hand and an open wound about 3 inches long on top of the head. He received blows on the chest—bones were fractured in the chest. He was bruised all over. He was taken

to hospital where the fractures were set in plaster and he was detained for a week. The wounds caused great pain and even at the time he gave evidence he had not regained full use of the hands for work.

This evidence of the appellant is not denied and therefore it is manifest that he received severe injuries from an able-bodied young man of 25 years of age. The assault was unjustified and even accepting that appellant had made the remark respondent alleges he did, there was no need for such an assault especially in that after they had been separated the respondent followed the appellant and inflicted more blows.

An award of £5 damages would therefore appear to be grossly inadequate. Young men who assault elderly people must realise that they can be called upon to pay high damages. In the circumstances we will increase the damages to £25 and costs.

Concerning the loss of £40 there is evidence on record that when the respondent was criminally tried no mention of £40 was made when appellant gave evidence. The Magistrate who tried the criminal case and the Court interpreter both state no mention was made of this. Appellant might be able to bring stronger evidence that he had £40 on him when he was assaulted and that this sum of money had disappeared as the result of the assault and therefore we think that the Assistant Native Commissioner should have entered an absolution judgment in respect of this claim. In the summons there are definitely two claims and we think that the Court *a quo* should have indicated in its judgment whether on the second claim it intended to give judgment for defendant or an absolution judgment.

In the circumstances this Court orders that the appeal be and it is hereby allowed with costs and the Assistant Native Commissioner's judgment is altered to read as follows:—

"Claim (*a*): Damages for assault: For plaintiff for £25.
Claim (*b*): Loss of money: Absolution judgment.

Defendant to pay costs."

Ramsay (Permanent Member) and Rossler (Member) concurred.

For Appellant: Adv. J. H. Niehaus, instructed by Messrs. Nel and Stevens.

For Respondent: Adv. O. A. Croft-Lever, instructed by Messrs. Van Rooyen & Forder.

NORTH-EASTERN NATIVE APPEAL COURT.

MGUDLULA *v.* DHLAMINI.

N.A.C. CASE No. 7 OF 1954.

ESHOWE: 21st April, 1954. Before Steenkamp, President, Ramsay and Leibbrandt, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Default judgment on claim for damages—Court must have before it evidence, either oral or by affidavit before granting—Rescission of default judgment which was irregular.

Summary: Plaintiff sued defendant for damages for seduction. On the day of hearing of the case, defendant was in default. The following day the Native Commissioner entered judgment for plaintiff without any evidence having been placed before the Court. Defendant subsequently applied to the Native Commisisoner's Court for the rescission of the default judgment. This application was refused and defendant thereupon noted an appeal against the refusal to rescind.

Held: That in terms of Rule 41 (7) of the Rules for Native Commissioners' Courts the Clerk of the Court shall refer to the Court any request for default judgment on a claim for damages and the plaintiff shall furnish to the Court evidence, either oral or by affidavit of the nature and extent of damages suffered by him, whereupon the Court shall assess the amount recoverable by plaintiff as damages and shall enter an appropriate judgment.

Held further: That the only exception to this rule is when the claim is for adultery or seduction in which, under the Native Custom concerned, there is a recognised scale of damages in which case the Court may dispense with evidence and enter an appropriate judgment forthwith.

Held further: That as the parties in the instant case are from Zululand, where there is no recognised scale of damages fixed, the Native Commissioner acted irregularly in awarding damages without plaintiff having adduced evidence to prove the damages he has suffered.

Held further: That defendant acted regularly in exhausting his remedies in the lower Court, viz., by applying for the rescission of the default judgment.

Held further: That if the Assistant Native Commissioner had applied his mind to the fact that default judgment given against the defendant was irregular he might have rescinded the judgment.

Cases referred to:

Kumalo *v.* Butelezi, 1939, N.A.C. (T. & N.), 144.

Statutes, etc., referred to:

Section *fifteen* of Act No. 38 of 1927.

Rule 41 (7) of the Rules for Native Commissioners' Courts.

Appeal from the Court of the Native Commissioner, Ingwavuma.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff sued the defendant for payment of £30 or value in stock in the amount of 6 head of cattle being as and for damages that plaintiff alleges he sufffered owing to defendant having committed adultery with plaintiff's wife. The defendant was summoned to appear on Thursday, the 7th January, 1954. On that day defendant was in default and a note appears on the record that plaintiff had to apply on the following day for the default judgment. The plaintiff again appeared on the following day and applied for judgment whereupon the Native Commissioner entered judgment by default for plaintiff, as prayed, with costs.

It is observed that the Native Commissioner did not comply with Rule 41 (7) of the Native Commissioners' Courts Rules published under Government Notice No. 2886 of the 9th November, 1951. This rule is to the effect that the Clerk of the Court shall refer to the Court any request made for the entry of judgment on a claim for damages and the plaintiff shall furnish to the Court evidence, either oral or by affidavit of the nature and extent of damages suffered by him whereupon the Court shall assess the amount recoverable by the plaintiff as damages and shall enter an appropriate judgment. The only exception to this rule is when the claim is one for adultery or seduction in which, under the Native Custom concerned, there is a

recognised scale of damages in which case the Court may dispense with evidence either oral or by affidavit and enter an appropriate judgment forthwith.

The parties in the instant case are from Zululand and therefore the amount to be awarded depends upon the circumstances of each case. According to the Natal and Zululand Code there is no recognised scale of damages fixed. In accordance with the decision in the case of Kumalo v. Butelezi, 1939, N.A.C. (T. & N.), 144, the extent of damages is left to the discretion of the Court and will depend upon the circumstances in each case. It will therefore be seen that the Native Commissioner acted irregularly in awarding the damages without plaintiff having adduced evidence to prove the damages he has suffered.

On the 19th January, 1954, the defendant applied to the Native Commissioner for a rescission of the default judgment given against him on the 8th January, 1954. In the supporting affidavit the defendant states that he was not in wilful default and that he confused the dates on the summons and appeared at a sitting of the Court on Tuesday, 5th January, instead of Thursday, 7th January, 1954. The application for rescission came before the Assistant Native Commissioner on the 25th February, 1954, and the Court called on the defendant to give further evidence as to his default on the 7th January, 1954. In his evidence the defendant states that he went to the Court-house on the 5th January, which is the date he was told by people who read the summons to him, he should appear. He further states he did not consider it necessary to worry the Clerks at the Court-house with this matter, seeing that he believed that he appeared there on the correct date. Plaintiff was not called upon to give evidence but there is a note on the record that he opposed the application on the grounds that defendant had admitted to him that he is aware of the date.

It seems a pity that the plaintiff was not called upon to give evidence on Oath. The statement made by him is of no value whatsoever, for the reason that the defendant was not in a position to cross-examine the plaintiff on the allegation that defendant had admitted that he was aware of the date. The Assistant Native Commissioner refused to rescind the default judgment previously obtained by the plaintiff.

Defendant has now appealed to this Court on the following grounds:—

"1. That the judgment is against the weight of evidence and generally against the evidence.

2. That the appellant is an uneducated Native and a mistake in the date was a reasonable mistake under the circumstances.

3. That the learned Assistant Native Commissioner was wrong in finding that appellant's appearance on the 5th in any way affected his non-appearance on the 7th.

4. That there was no evidence of any wilful negligence on the part of the appellant."

The Assistant Native Commissioner has found proved that the defendant did, in fact, appear at the Court-house on the 5th January, 1954. In his reasons for judgment the Assistant Native Commissioner states that it is very difficult to appreciate the action of the defendant in appearing at the Court-house on the 5th and leaving again without making any enquiries as to why his case was not heard on that day. He also remarks that the fact that the defendant claims to be illiterate is of very little consequence as it is common knowledge that most of the litigants in the rural areas, particularly in that district, are illiterate, yet there are very few cases occurring where the parties become confused with the dates. He also states that in the defendant's case this is less credible as he is a man of years and an active participator in business deals in the district; he was for years

a partner in a bus venture and held the post of treasurer; also he has appeared on several occasions recently as a party in some civil case or other.

The Assistant Native Commissioner is not, in the absence of any evidence on record, justified in taking judicial notice of the facts he mentioned which are presumably within his personal knowledge. Judging from the record as a whole, there is no indication at all that defendant was in wilful default. The defendant could have appealed against the default judgment delivered by the Native Commissioner who acted irregularly but it has been laid down by this Court and other Courts that a party should first exhaust all the remedies in the lower Court before coming to a higher Court. Defendant has approached the Court *a quo* for a rescission of the default judgment and that was the correct procedure to follow and we think that if the Assistant Native Commissioner had applied his mind to the fact that the default judgment given against the defendant was irregular he might have taken a more lenient view and rescinded the judgment.

It has often been remarked that the default judgment is a drastic provision in our law and when it has been granted and application is made for rescission, the Court should lean towards granting the application rather than refusing it.

It is true that although the defendant has not, in his grounds of appeal, mentioned the fact that the default judgment was irregular, this Court feels that after the Assistant Native Commissioner had refused to rescind it the defendant could then have appealed against the Native Commissioner's default judgment and apparently he would have had very good grounds for succeeding. To save further costs this Court, acting within the powers conferred on it by section *fifteen* of the Native Administration Act, No. 38 of 1927, will come to the relief of the defendant and it is ordered that the appeal be and is hereby allowed with costs and the Assistant Native Commissioner's judgment is altered to read:—

> "Default judgment granted on 8th January, 1954, is hereby rescinded. Defendant is ordered to pay the costs of the application for the rescission of the default judgment."

Ramsay (Permanent Member): I concur.

Leibbrant (Member): I concur.

For Appellant: Mr. W. E. White.

Respondent In default.

NORTH-EASTERN NATIVE APPEAL COURT.

MABUYAKHULU *v.* MABUYAKHULU.

N.A.C. CASE No. 117 OF 1952.

ESHOWE: 23rd April, 1954. Before Steenkamp, President.

LAW OF PROCEDURE.

Costs—Successful party who appeared in person—Travelling and subsistence expenses.

Summary: After the Registrar had allowed in a bill of costs submitted by the successful party, who was not legally represented but appeared in person in Court, certain items in

respect of travelling and subsistence allowances, the other party applied for review of the taxation.

Held: That Rule 29 (*b*) of the Rules for Native Appeal Courts definitely lays down that a party, who is not legally represented, may claim necessary disbursements.

Held further: That all respondent has claimed are such disbursements.

Held further: That there is no logic in any submission that because a person defends a judgment granted in his favour he should be out of pocket because the other side saw fit to note an appeal.

Cases referred to:

Ngubane *v.* Ngubane, 1952 N.A.C. 281 (N.E.).

Statutes, etc., referred to:

Rules 24 and 29 (*b*) of the Rules for Native Appeal Courts.

Application for review of taxation by the Registrar of a Bill of Costs.

Steenkamp (President):

The applicant, who was appellant in the above-mentioned case, heard by the Native Appeal Court on the 28th April, 1953, was unsuccessful in his appeal which had been noted late and the application for condonation was dismissed with costs.

Respondent appeared before the Native Appeal Court in person and on his application the Registrar of the Court taxed his Bill of Costs in an amount of £5. 15s. 6d., which was made up of travelling expenses and subsistence from his home in the Ingwavuma district to the seat of the Court at Eshowe.

The applicant has now, in terms of Rule 24 of the Native Appeal Court Rules published under Government Notice No. 2887 of 1951, applied to me to review the Bill of Costs, as taxed by the Registrar. Counsel for applicant appeared before me on the 22nd April, 1954, and argued that no provision is made in the Native Appeal Court Rules for a successful party to claim travelling expenses and for that matter, subsistence, and he has quoted the case of Ngubane *v.* Ngubane, 1952, N.A.C. 281 (N.E.). In that case this Court, in an appeal from the Native Commissioner's Court decided that a composite fee prescribed under Table A of the Native Commissioners' Courts Rules for an attorney's appearance is intended to include his travelling expenses, if any, and no relaxation of the Rule is justified.

The present review can be distinguished from that case and we now have to deal with a party who appears in person without legal assistance. It is not correct for Counsel to state in his letter to the Registrar that no provision exists in the Native Appeal Court for a party to claim travelling and subsistence disbursements to enable him to appear before the Native Appeal Court. Rule 29 (*b*) of the Native Appeal Court Rules definitely lays it down that such a person may claim necessary disbursements and this is all the respondent has claimed and I do not see, nor is there any logic in any submission that because a person defends a judgment granted in his favour should be out of pocket because the other side saw fit to note an appeal. In the circumstances I hold that the Registrar of this Court correctly taxed the Bill of Costs submitted by the respondent and the application is therefore dismissed.

For Applicant: Mr. W. E. White.

For Respondent: No appearance.

CENTRAL NATIVE APPEAL COURT.

RANGATA *v.* MABUZA.

N.A.C. CASE No. 43 OF 1953.

JOHANNESBURG: 26th April, 1954. Before Marsberg, President, Menge and Eaton, Members.

LAW OF PROCEDURE.

Practice and Procedure—In what circumstances consent should be granted for leave to appeal to the Appellate Division of the Supreme Court in a matter dealt with under common law.

Summary: On the 4th January, 1954, the Central Native Appeal Court, by a majority decision from which the Permanent Member dissented, gave a decision reversing the judgment of the Native Commissioner, Johannesburg, in a matter dealt with under common law and involving a claim of £340 being the balance of the purchase price of a night watch patrol business. The Appeal Court's decision was, in effect, that there had been a delivery of the business to the buyer. The applicant, Rangata, against whom the decision went, applied for the Court's consent to apply for leave to appeal to the Appellate Division. At the hearing the merits of the case were argued by applicant in order to establish prospects of success.

Held: Refusing consent for leave to appeal, (the Permanent Member dissenting): That nothing could be inferred from the judgment of the Court that it was in any difficulty about the case; that the Court did bring its mind to bear on the evidence and that it was in no doubt in holding that delivery of the business was effected.

Cases referred to:

Geelbooi Kunene *v.* Alfred Dhlamini, 1938, N.A.C. (T. & N.), 275.

In *re* Minister of Native Affairs, 1941, A.D., 321.

Rex *v.* Bhana 1954 (1) S.A. (A.D.) at page 51.

Mpondi Nhleko *v.* Mankankoni Nhleko, 1948 N.A.C. (T. & N.), 2.

Afrikaanse Pers Beperk *v.* Olivier, 1949 (2) S.A. (O.P.D.) 890.

Statutes, etc., referred to:

Sections *fourteen* and *eighteen* of Act No. 38 of 1927.

Application for consent to appeal to the Appellate Division.

Marsberg (President):

On the 4th January, 1954, this Court delivered its reserved judgment in the appeal from the Native Commissioner's Court at Johannesburg in case No. 115/1951 in which Ben Jacob Mabuza was the plaintiff and Abel Rangata, the defendant. The appeal was allowed and the Native Commissioner's judgment was altered to read:

On main claim:

For plaintiff for payment of £340.

On counterclaim: (1)

Claim dismissed.

Costs:

On the appeal: For appellant. Hearing fee increased to £3. 3s.

In the Native Commissioner's Court: For plaintiff but limited to fifteen per cent of taxed Bill of Costs.

Defendant now prays that this Court may be pleased to grant an order, in terms of section *eighteen* of Act No. 38 of 1927 allowing defendant to appeal to the Appellate Division of the Supreme Court of the Union of South Africa against the whole of aforesaid judgment delivered by the Native Appeal Court.

The petition is couched in the following terms:—

"1. Your Petitioner is Abel Rangata.

2. The Respondent is Ben Jacob Mabuza.

3. During the year 1951, Respondent sued Applicant in the Native Commissioner's Court, Johannesburg, for the sum of £340 being instalments due on the purchase price of a business and Applicant counterclaimed for the sum of £20 being instalments paid on the said business and £90 being arrear wages.

4. On or about the 21st day of November, 1952, the Additional Native Commissioner, Johannesburg, gave a judgment of absolution from the instance on Respondent's claim and judgment in favour of Applicant on Applicant's counterclaim, as will more fully appear from the record of the above case No. 821/1952.

5. On or about the 26th day of October, 1953, the Respondent appealed against the said judgment and the said Appeal was heard by the above Honourable Court.

6. On or about the 4th day of January, 1954, the above Honourable Court gave judgment in favour of Respondent in the sum of £340 and dismissed Applicant's Counterclaim as will more fully appear from the record of the above Appeal No. 37/1953.

7. The said judgment was delivered by the Honourable President of the said Court and Mr. R. L. Eaton, a member of the said Court. Mr. W. O. H. Menge a permanent member of the said Court, however, delivered a dissenting judgment in which he upheld Applicant's judgment of absolution in the Court below.

8. It is respectfully submitted that the claims are considerable ones and are of vital importance to Applicant who is a poor man. Respondent is now in a position to claim an additional sum of £160 from Applicant, as further instalments of the said purchase price.

9. It is submitted further that there is a reasonable prospect of success in an appeal against the judgment of the above Honourable Court to the Appellate Division of the Supreme Court.

10. It is submitted further that the question as to whether Respondent had failed to carry out his obligations in terms of the Agreement between the parties, is a difficult question of law and it would appear from the authorities that the Appellate Division has never ruled on the question of what exactly constitutes delivery of a business."

In presenting the petition before us Mr. Spitz who appeared for applicant/defendant put his request into three categories.

First: The importance of the matter to the applicant. A large sum, £500 was involved in the judgment. Applicant is a Native and is a poor man.

Second: Importance of the case in law. As indicated in paragraph 10 of the petition the question as to whether respondent/plaintiff had failed to carry out his obligations in terms of the agreement between the parties is a difficult question of law. From the authorities it would appear that the Appellate Division has never ruled on the question of what exactly constitutes delivery of a business.

Third—Prospect of Success:

(*a*) The Native Commissioner had found that there was no delivery of the business. There was a dissenting judgment in the Native Appeal Court. Were the terms of the agreement fulfilled? Was there delivery? Mr. Spitz quoted extensively from the remarks recorded in the dissenting judgment.

(*b*) If we were prepared to consent to the petition being heard on the point whether there was delivery of this business in law, then, for good measure, he suggested that the Appellate Division might as well deal with the point whether applicant had proved his claim for payment of arrear wages of £90, (Claim No. 1 under the counterclaim). This was a matter of credibility of evidence and the Appellate Division might well take a different view from the Native Appeal Court.

(*c*) Similarly, the Appellate Division might as well give a ruling as to whether applicant was entitled to resist payment on the grounds of Respondent's misrepresentations.

In regard to (*b*) and (*c*) Mr. Spitz conceded that if they stood alone applicant would have no prospect of success. On these two aspects of the case, moreover, the members of the Native Appeal Court were unanimous in their judgment in favour of respondent/plaintiff.

In brief, the points he wished to be stated were:

(*a*) In law was there delivery of this business?

(*b*) Has the defendant (applicant) on the evidence proved that he was entitled to arrear salary? (of £90).

(*c*) Was the defendant entitled to resist payment on grounds of plaintiff's misrepresentation?

The three points stated, in effect, cover the whole of the proceedings in the Native Commissioner's Court. It would be necessary to traverse the whole of the record to arrive at decisions upon these points. A rehearing of the whole case would be involved. We are doubtful if it was ever the intention of Parliament to give litigants the right of appeal against the judgments of the Native Appeal Court, as though the Court were a Court of first instance. Had that been the intention the wording of section *eighteen* of the Act would have been different and would have expressly provided for the right of full appeal as of course. But not only does section *eighteen* stipulate that the consent of the Native Appeal Court is essential but the appeal can be prosecuted only upon any point stated by the Court. We agree with the remarks of McLoughlin. P., in the case of Geelbooi Kunene *v.* Alfred Dhlamini (1938, N.A.C., T. & N. 275):—

> "the points to be stated should not be mere legal quibble nor arise from specious argument but should be debatable points of substance. Indeed it would almost appear that what is intended is the submission of such points as the Native Appeal Court found difficulty in deciding, whether by reason of obscurity of law, conflict of fact or uncertainty of procedure."

Having conceded that points (*b*) and (*c*) above would have no prospect of success Mr. Spitz could hardly expect us to consent to their being submitted to the Appellate Division.

In support of his argument under point (*a*) he relied largely on remarks in the dissenting judgment. It would have been of greater force had Mr. Spitz invited attention to conflicts or uncertainties or inconsistencies in the judgment of the Court to which we could have given consideration. Sub-section (7) of section *thirteen* of Act No. 38 of 1927 provides that "the decision of the majority of the members shall be the judgment of the Court". Disagreement between the members of the Court does not detract from the validity or effectiveness of the judgment of the Court. Indeed the Law Reports record many instances where the Bench has not been unanimous. To seek to set one judgment against the other is futile. As the dessenting judgment upon which Mr. Spitz relied is not the judgment of the Court it is not our purpose to bring it under consideration.

We propose to view the judgment of the Court objectively to ascertain whether the Native Appeal Court itself was in doubt upon any points, and particularly the one put forward by Mr. Spitz viz.: whether in law there was delivery of this business.

Arguing the latter point Mr. Isaacs, for respondent, submitted that the parties and the Native Appeal Court were on common ground in regard to the law. There was no divergence of opinion that delivery of the business could have been effected only in one way, viz. *brevi manu,* a form of delivery with which the humblest student is familiar. Whether, in the case before the Court, delivery was effected in this manner was a question of fact, not of law. In this respect we agree with Mr. Isaacs. The Native Commissioner does not appear to hold the view expressed by applicant in paragraph 10 of the petition. In his reasons for judgment he says: "The action between the parties was a simple one." Again "The legal aspect was clear. The Court had only to apply the law of purchase and sale to the facts adduced by evidence before it to reach its decision". Be this as it may, the record discloses that the Native Commissioner's written judgment consists mainly of academic observations on purchase and sale, and that his decision was arrived at in the following extract from the "Reasons".

> "Before a seller can claim payment, he must be prepared to carry out his part of the contract, viz., to make delivery of the merx sold in terms of his contract. After having weighed the evidence carefully the Court concluded that the plaintiff has failed to satisfy it that he had in fact done what he was in duty bound to do in terms of his contract, he was therefore not entitled to demand payment of his arrear instalments, because for two months the buyer did pay his instalments in terms of the contract and then wrote to the plaintiff to deliver the merx sold otherwise he would stop further payments. Unless he (the plaintiff) was prepared to carry out his part of the contract by making delivery he is not entitled to ask for payment and the Court therefore granted Defendant absolution from the instance with costs." Unfortunately the Native Commissioner does not identify the evidence which he states he had weighed carefully to enable us to say whether he had arrived at a correct conclusion. The Native Appeal Court observed: "We are of opinion that, had the Native Commissioner kept his attention strictly to the pleadings and the evidence which was relevant, he could not reasonably have arrived at his conclusion."

The Native Appeal Court then proceeded to examine the evidence and recorded several general aspects of the case which appeared to settle the matter, viz.:—

(1) The business in question was established in June, 1942; in 1947 applicant entered its service as Secretary; from February to August, 1949, applicant had sole management of the business; on 10th August, 1949, he purchased it for £500 by Deed of Sale drawn up by his attorneys; he continued to carry on the business until early 1951.

The Native Appeal Court observed that applicant could hardly have carried on the business if the merx had not been delivered. To us plain common sense can lead to no other conclusion than that a business which continued for nearly 10 years, at first under one person and then under another, must have been transferred or delivered from the one to the other. To hold otherwise would be absurd.

(2) The Native Appeal Court accepted the definition of merx or "material assets" in the restricted sense as used and detailed by *appl cant* in his pleadings. We find the following statement in its judgment:—

> "The crux of the case seems to be in paragraph B of the plea, that is, Defendant's allegation that Plaintiff failed to deliver the business and in particular the rights and privileges enumerated therein. The gravamen of Defendant's argument before us was that until it had been established that each and every article which formed portion of the assets had been delivered the contract had not been fulfilled. Mr. Isaacs who appeared for appellant *clearly proved to our satisfaction, and with painstaking references to the evidence,* that every right and privilege enumerated by Defendant in his plea had been accounted for".

There is clear ind cation here that on the facts of the case the Native Appeal Court was in no doubt that the merx had been delivered. The Court said:—

> "It is obvious to us, however, that the Defendant did take over the business, as evidenced by the Deed of Sale; that he paid two instalments of the purchase price and carried on the business until early 1951 (he could hardly have carried on had the merx not been delivered); that delivery of the material assets was effected *brevi manu;* that in November, 1949, he sued as owner of the business for transfer of the telephone. What Defendant received was a going concern, may be with many imperfections, known as 'The Sophiatown Night Watch Patrol Corporation', not the imaginary thing created in the pleadings, emphasizing rights and privileges which could not have been in the contemplation of the parties."

We have perused the judgment of the Native Appeal Court very carefully but can find no passages from which we could infer that they were in any difficulty about the case. In particular the point stated by applicant, viz.: in law was there delivery of this business?—does not appear to be suitable for submission to the Appellate Division. If there has been no previous ruling on the matter by that Division it would be inappropriate to seek enlightenment on an academic question. More to the point we are satisfied that on a question of fact the Native Appeal Court d.d bring its mind to bear on the evidence and the record discloses that it was in no doubt in holding that delivery of the business was effected.

We are unable to give our consent for leave to appeal to the Appellate Division and the application is accordingly refused with costs.

R. L. Eaton (Member): I concur.

Menge (Permanent Member) dissentiente:

I am unable to support the judgment of the learned President in this matter; at least in so far as it concerns the first point on which the applicant desires to appeal, namely, "whether there was a delivery of the business in law". As regards the second and third points I agree that consent be refused to the application for leave to appeal; but only because counsel for applicant stated that he would not have pressed either of these points standing on their own. He merely urged that they "might as well" be put forward if consent is granted in regard to the first point. That is hardly a sufficient reason for granting consent.

The application is governed by section *eighteen* (1) of the Native Administration Act, No. 38 of 1927, as interpreted in the matter In *re* Minister of Native Affairs, 1941, A.D., 321. It concerns an appeal judgment in a case which has the following indisputable features:—

(*a*) The matter was a very complicated one. How complicated it was appears clearly from the appeal judgment of the learned President.

(*b*) It was a lengthy trial. The record goes into well over 200 typed pages.

(*c*) This Court heard argument fully for both sides before deciding the issue involved.

(*d*) The Court was not unanimous. The learned President and the Assessor Member reversed the decision of the Court *a quo*, whilst the Permanent Member supported that decision.

(*e*) The appeal was heard on the 26th October, 1953, and argument lasted three days. Judgment was given on 4th January, 1954. Even though other work intervened, the inference is that it took a considerable time to prepare the judgment.

(*f*) The point in dispute is what, in law, constitutes delivery of a business. On this point there would as yet appear to be no authoritative statement.

(*g*) The amount involved is £340 at least.

If this case is not a proper one for allowing an appeal, then it is not easy to picture circumstances in which an appeal should be allowed. Here a sum of £340 is involved. As counsel for applicant has pointed out this is well above the jurisdiction of magistrates, whose judgments are none the less appealable. The point in dispute, as I see it and as Counsel argued it before us, is, to put it in a nutshell, whether a business can be said to have been delivered in pursuance of a sale if the seller refuses to deliver the books and records of the business, which books and records the seller himself acknowledges to be vital to a purchaser. If not, then the appellant must succeed. The majority of the Court has in effect ruled that he has no prospect of success, despite the dissenting judgment in the case; and it has dismissed the application for consent to apply to the Appellate Division for leave to appeal. Section *eighteen* of the Act seems to indicate that the applicant has no further redress, and his case has thus been finally disposed of.

So be it then.

But the matter does not altogether end there. Whilst the *fact* that the applicant is debarred from appealing is of no interest save to himself, the *reason* why this has come about is quite another matter, one of vital importance to all men. For if the Native Appeal Courts can construe, or, shall I say apply section *eighteen* of the Act in such a manner as completely to oust the jurisdiction of the Appellate Division of the Supreme Court where Natives are the litigants; set themselves up as the highest Courts in the land and, in fact, sit as Courts of Appeal from their own decisions, then there must be something radically wrong. Yet that is what has happened in this case, as appears from the learned President's judgment. The Court set out to deal with an application for leave to appeal; but owing to the majority of the Court construing section *eighteen* as rendering its judgments final save in very special circumstances, the proceedings developed quite unintentionally but inevitably into something on these lines: The Court sat in judgment on its own judgment and considered that judgment; found it excellent, and confirmed it. This procedure, whatever the merits of the case, is an absurdity. Consequently the ratio dicendi on which it is based must be faulty. How can such a procedure be prevented?

The judgment is mainly concerned with giving reasons why the Court's previous judgment has not been shown to be wrong. That is not in point here. Only at Bloemfontein can that aspect be gone into. What is in point are the principles which the Court applied, or should have applied, in considering the question of granting consent to an application for leave to appeal. On this subject the judgment says practically nothing beyond quoting (not very aptly as I will show presently) a passage from the judgment of McLaughlin (President) in a former case.

It therefore becomes necessary to examine very closely what the scope of section *eighteen* is, or, rather, what scope it allows the Native Appeal Courts in considering applications made thereunder.

The section is quite clear. If the Native Appeal Court refuses to consent to an application for leave to appeal then there is, at least as far as the litigant is concerned, no redress. I am not competent to assess the full effect of the words in sub-section (1), viz.: "subject in any event to the Rules of the said Appellate Division"; but I shall assume, on the strength of the opening words of the sub-section, that they do not enable an applicant who has failed to obtain the consent of the Native Appeal Court to seek relief from the Appellate Division. Apparently only the Minister of Native Affairs could do that,—under section *fourteen* of the Act, and only for his own purposes.

But the idea that there should be no relief is clearly contrary to the basic principles of the Union's judicial set-up; for in the recent case of Rex *v.* Bhana, 1954 (1), S.A., at p. 51, where section *one hundred and five* of the South Africa Act (which deals with both civil and criminal appeals) is under discussion, the learned Chief Justice states:—

> "In these circumstances it is satisfactory to be able to come to a conclusion which affords a litigant a wider field and which is in consonance with the policy of the Legislature, viz.: that a litigant should have the right to apply for leave to appeal to the highest Court in the land in cases which have originated in Magistrates' Courts or other inferior Courts."

Why should this dictum not be equally applicable where decisions of the Native Appeal Courts are concerned? Should a European, or Indian or Coloured person be in a more favourable position than a Native? If the Provincial Division refuses to grant leave to appeal, such a person can still apply for leave to the Appellate Division. But a Native cannot (unless the respondent in the action is not a Native). There is no provision corresponding to section *one* of Act No. 1 of 1911, relating to the Natal Native High Court. Clearly the differentiation brought about by section *eighteen* is not based on grounds of race or colour or because litigation for Natives has been made less expensive. It can only be based on the fact that where Natives are concerned the State recognises a separate system of law, known as Native Law and Custom. This system is administered in separate courts by officers specially trained for that purpose. The Native Appeal Court consists of judicial officers of the Department of Native Affairs who are deemed to be experts in that system. So that where Native Law and Custom only are concerned there is something to be said for the view that the Native Appeal Court is virtually the highest Court in the land, and that consent to apply for leave to appeal should be granted only in exceptional circumstances. Only in such cases can the test laid down by McLaughlin (President) in Geelbooi Kunene's case cited by the learned President be supported. To apply this test (as actually was done in that case), to a matter not concerned with Native Law, is, as I will endeavour to show, quite improper.

Where the ordinary law of the land is concerned, the legislature must have supposed that the tests or principles which the Native Appeal Courts must formulate in order to decide on an application under section *eighteen* would be reasonable. There is nothing

inherently wrong with section *eighteen*. It is just a matter of how to apply it. What then are these principles? So far no real attempt has been made to formulate them, except in the case quoted above and in Mpondi Nhleko *v.* Mankankeni Nhleko, 1948, N.A.C. (T. & N.), p. 2. In the latter case, in which Native Law also does not seem to have been involved, the Court applied what it (wrongly) thought were the principles adopted by the Supreme Court. Counsel in arguing this application also took that line. But I do not see how this is possible. The Supreme Court principles are those of the Appellate Division and are summarised in Afrikaanse Pers, Beperk, *v.* Olivier, 1949 (2), S.A., 890 (O.P.D.), as follows:—

(*a*) The appellant must satisfy the Court that he has a reasonable prospect of success;

(*b*) the case must be one of substantial importance to the appellant alone or to both the appellant and the respondent.

Now these principles have been laid down for Courts whose decisions thereon are not final—save as to the Appellate Division itself. If a Provincial Division errs in their application no irreparable harm is done. The applicant can still go to the Appellate Division. But if the Native Appeal Court errs in the application of the same principles the applicant has no redress—even if consent is refused from improper motives. In the result, whilst the ordinary litigant has the right to go right up to the Appellate Division, the Native has not even the right to have his case heard by professional judges. Surely, then, there is something wrong in applying these two Supreme Court tests—at all events the first—in cases not dealt with under Native Law and Custom. As I see it the Native Appeal Courts cannot apply them without at the same time usurping the very functions which the Appellate Division should be performing, and arrogating to themselves a status and powers which even the Provincial Divisions of the Supreme Court do not enjoy.

What tests should the Native Appeal Courts then apply in cases governed by the ordinary law of the land? The first of the Supreme Court tests, as regards prospects of success, must be ruled out because of the objections I have stated. But although these objections are equally applicable to the second of these tests,—in that the Native Appeal Courts would not, like the Provincial Divisions be answerable for their findings on the question whether the subject matter of the dispute is of substantial importance to the party seeking relief or to both parties—yet the application on of this test can be supported on logical grounds. After all some meaning must be given to section *eighteen*. The Native Appeal Courts can without doubt legitimately apply this test in cases under Native Law and Custom. Clearly this hypothesis cannot be disturbed by a variation of the system of law under which the case is tried. The enquiry is largely of a factual nature governed by common sense and not by any particular system of law.

It seems, therefore, that if the Court is satisfied that this substantial interest is present, then it has no right to refuse consent for leave to appeal, save perhaps in one instance, viz.: Where the point on which it is desired to appeal is frivolous or a plain insult to the intelligence of a Court of Law. In relying on this exception the Court could not really be given a verdict on the probabilities of success, but would be exercising a right which every Court has, namely to prevent abuse of the process of the law.

To summarise, then, the principles which in my opinion should guide the Native Appeal Court in considering whether or not to consent to an application under section *eighteen* are:—

A. *In cases concerning only Native Law and Custom.*

(1) The appellant must satisfy the Court that he has a reasonable prospect of success on appeal; and

(2) the case must be one of substantial importance to the appellant alone or both the appellant and the respondent;

(3) consent should not be granted readily.

B. *In cases where the Ordinary Law of the land is concerned.*

(4) As in (2) A above;

(5) consent may be refused if the application is in the nature of an abuse of the process of the law by reason of the points relied on being frivolous or a plain insult to the intelligence of a Court of Law;

(6) consent should be granted if at all possible.

One other principle could be mentioned: That consent should not be withheld if the Court is not unanimous. That requires no elaboration.

It remains to consider the bracketed portion of sub-section (1) of section *eighteen* which requires the Court to state the points to be relied on on appeal since here too there is some confusion. If the Court finds difficulty in framing these points it can enlist the applicant's assistance. In fact, it should always do so, considering that it is the latter who is paying for the appeal and who will eventually have to argue it.

For these reasons I contend that the Court's decision to refuse leave in this case is wrong in law.

I contend, further, that an important aspect of constitutional law fraught with serious consequences is involved, namely that side of the country's judicial set-up for which the Department of Native Affairs is responsible. If there are to be no checks and safeguards then judicial officers, being human, may be tempted to neglect the never-ending arduous research and hard thinking to which, according to Haldane, a lawyer's life should be dedicated, and seek refuge in the simple credo: *Hoc volo, sic jubeo, sit pro ration voluntase.* And when that happens the Native Appeal Courts will sink into disrepute. I think, therefore that our respective judgments in the matter of this application should be referred to the Department of Native Affairs for consideration by the Honourable the Minister under section *fourteen,* and posing the question which of these judgments sets out the more correct approach to the question as to what principles should guide the Native Appeal Courts in considering applications for consent to apply for leave to appeal under section *eighteen* of the Act, and, if neither is correct, what these principles are.

For Applicant: Adv. D. Spitz, instructed by Messrs. Helman & Michel.

For Respondent: Adv. D. D. Isaacs, instructed by Messrs. Sacks & Berman.

SOUTHERN NATIVE APPEAL COURT.

JENTI *v.* **JAKENI.**

N.A.C. CASE No. 19 OF 1954.

BUTTERWORTH: 13th May, 1954. Before Warner, Acting President, Potgieter and Crossman, Members of the Court.

XHOSA NATIVE CUSTOM.

Xhosa Native Custom—Disposition of Great House heir as heir to Qadi House—Nomination and adoption by kraal head at family meeting of heir to Qadi House from Right Hand House where there is no male issue in the former and one son besides the heir in the Great House.

At a meeting of relatives, the kraal head (Jenti Jakeni) who had three wives: Nowaka (Great House) with two sons living of which plaintiff is the eldest and heir; Novili (Right Hand House) with two sons of which defendant is the younger and; Nowakile (Qadi House) with no sons, deposed plaintiff as heir to the Qadi House through his apparent misconduct and appointed appellant from the Right Hand House as heir to the Qadi House. After the kraal head's death the Qadi wife left defendant's kraal and went to live at plaintiff's kraal upon which summons was issued by plaintiff claiming the Qadi House effects. Judgment was given in his favour, the nomination of defendant as heir to the Qadi House being held invalid.

Defendant appealed on the grounds that the judgment was not in accordance with the evidence adduced and was further contrary to Native Custom.

Held: Where no objection is raised at a family meeting to the appointment of any son by the father as heir to a house having no sons the appointment is valid and in accordance with Native Custom.

Cases referred to:

1. Mavuma *v.* Mavuma, 1954 N.A.C. 38 (S).
2. Sibozo *v.* Notskovu, 1, N.A.C., 198.
3. Mhlokonywa *v.* Mhlokonywa, 1933, N.A.C. (C & O), 64.
4. Sonti *v.* Sonti, 1929, N.A.C. (C & O), 18.

Cases distinguished:

1. Kwoza *v.* Mofesi 2, N.A.C., 17.
2. Sitole *v.* Sitole, 1938. N.A.C. (N & T) 35.

Appeal from the Court of the Native Commissioner, Idutywa.

Warner (Acting President):—

The facts in this case are not in dispute. The late Jenti Jakeni had three customary wives, Nowaka (Great Wife) Novili (Right Hand Wife) and Nowakile (Qadi Wife). In the Great House he had one son, Kimbili, who predeceased him leaving two sons, plaintiff and Tembile. In the Right Hand House there were two sons, David and defendant. In the Qadi House, there were four daughters but no sons.

In 1945 Jenti Jakeni had a meeting which was attended by all his relatives and the headman, C. K. Sakwe. At this meeting Jenti announced that he was dissatisfied with plaintiff's conduct towards him and that he was appointing defendant to be his heir in the Qadi House. Plaintiff was present at this meeting. He did not object to being deposed as heir to the Qadi House but stated that his brother, Tembile, should be substituted as heir. The meeting decided that defendant should be placed in the Qadi House as its heir. From that time, defendant assumed the duties as heir in the Qadi House. Jenti became bed-ridden and defendant carried out negotiations in regard to marriages of the daughters and received the dowry. Jenti transferred to him his title to the land occupied by him. Jenti died in 1949. Plaintiff assumed possession of the assets in the Great House, while defendant assumed possession of those in the Qadi House. Defendant also maintained the widow Nowakile. In 1953 Nowakile left her kraal and went to live with plaintiff who then issued summons in this action claiming the assets in the Qadi House. The Native Commissioner gave judgment in his favour holding that Jenti's nomination of plaintiff as his heir in the Qadi House was invalid and defendant has appealed on the following grounds:—

(1) That the judgment was not in accordance with the evidence adduced.

(2) That the presiding Judicial Officer erred in overlooking the fact that *there was no male issue in the Qadi to the Great House of the late Jenti Jakeni* and that the institution of appellant as heir to such house was in effect an act of adoption of an heir by the late Jenti Jakeni (vide Sibozo *v.* Notshokovu, 1 N.A.C. 198), and that in such circumstances it was not necessary in Native Law and Custom for the late Jenti Jakeni to formally disinherit the plaintiff in respect of the said Qadi House as plaintiff's right of succession thereto was potential only in common with that of every other male member of the family and further that in the circumstances the disinherison of respondent (plaintiff) by the said late Jenti Jakeni was merely an added precaution taken by him to ensure the validity of his act of putting in the defendant as heir to the said Qadi House.

(3) That in any event even assuming that it was incumbent upon the late Jenti Jakeni to formally disinherit the plaintiff in respect of the said Qadi House and that the presiding Judicial Officer was correct in his interpretation of Native Law and Custom regarding the institution of an heir by the said late Jenti Jakeni, then he should still have found on the evidence that plaintiff was disinherited in a constitutional way, in which event it was and is not competent in Native Law and Custom for either the late Jenti Jakeni or the Court to reinstate plaintiff as heir.

(4) That the judgment was further contrary to Native Law in that having validly and constitutionally disinherited the plaintiff it was competent for the late Jenti Jakeni to institute as heir any other person at the time of the disinherison.

(5) That the plaintiff having acquiesced in the act of disinherison by his conduct as disclosed by the evidence on record and plaintiff's attorney of record in the Court below having accepted that the act of disinherison was constitional (as distinct from the institution of defendant as heir) it is not now competent for the plaintiff to dispute the fact of his disinherison.

The position in this case seems to have become confused owing to the use of the word "disinherit". In appointing defendant as heir of the Qadi House, the late Jenti was not disinheriting plaintiff. The latter still remained as the heir of the Great House and he still had a potential right to succeed to the property in the Qadi House even if this possibility was rendered more remote by the appointment of defendant as heir to that House. The difference between disinherison and the adoption of a son in a house which has no male issue was explained in the case of Mavuma *v.* Mavuma, 1954 N.A.C. 38 (S).

In the case of Sibozo *v.* Notshokovu, 1 N.A.C., 198, it was stated that it is not unusual for a native having no male issue to adopt an heir or if a polygamist and having no male issue in one house taking a son from another house and putting him in as heir to that house. This is what has been done in the present case.

The case of Mhlokonywa *v.* Mhlokonywa, 1933, N.A.C. (C. & O), 64, dealt with the position where there was no male issue in the Great House and two sons in the Right Hand House, the younger of whom was nominated as heir of the Great House. The arrangement was not challenged or disturbed and it was only after deceased's death that the elder son claimed to be heir of the Great House. It was held that, both parties to the suit and all the members of the family having accepted the appointment made by the deceased, it was too late for the elder son to endeavour to nullify the formal institution of the younger son as heir in the Great House. The same position obtains in the present case.

In the case of Sonti *v.* Sonti, 1929, N.A.C. (C & O), 18, it was stated: "The Native Assessors, having been consulted, state that *under the circumstances disclosed* it was not competent for the late Dyantyi to appoint the younger son of the Right Hand House as heir to the Great House. This Court concurs in this expression of opinion". The judgment does not indicate what is intended by the words "*under the circumstances disclosed*" but, the learned President went on to say: "Even if Native Custom did permit of such an act on Dyanti's part, the plaintiff has failed to prove that he did so. Furthermore, the assertion of the plaintiff that he was designated as heir of the house of Nomahini at a time when she was a compartively young woman and not past the age of child-bearing is most improbable and inconsistent with Native Custom". This seems to indicate that the Court based its decision more on the failure of plaintiff to prove that he had been appointed as heir to a house in which there was no male issue than on a ruling that such an appoinment would be invalid.

Mr. Ellis has drawn the attention of this Court to the judgment in the case of Kwaza *v.* Nofesi, 2 N.A.C. 17, but it seems that that judgment does not carry the present case any further. It states that it is not customary when there is an heir in the Great House, and no heir in the Qadi House, to appoint an heir into that Qadi House from another Qadi but does not say whether an heir into the Qadi House can be appointed from the Right Hand House.

The case of Sitole *v.* Sitole, 1938, N.A.C. (N & T). 35, quoted by the Native Commissioner, has no bearing on the present case because it is a case dealing with Zulu Custom and the disinherison of an heir to kraal property.

The Native Assessors have been consulted and their opinions are appended.

The expression of opinion given by the majority is consistent with previous decisions of this Court and should, in my opinion, be accepted.

I consider that the appeal should be allowed with costs and the judgment of the Court below altered to one for defendant with costs.

Potgieter (Member): I concur.

Crossman (Member): I concur.

Expressions of Opinion by Native Assessors.

Names of Assessors.

George Ntantala (Idutywa), Masumpa Sokapase (Nqamakwe), Robert Soshankana (Willowvale), Geoffrey Reve (Kentani) and C. W. Monakali (Butterworth).

The facts of the case are put to the Assessors and they are asked to state the position under Native Custom.

Replies.

George Ntantala: The eldest son in the Great House inherits the property in the Qadi House. If the grandfather did not approve of the elder son from the Great House he should appoint the younger son from the same house. According to Native Custom it has never happened that a son from the Right Hand House succeeds to the property of the Qadi of the Great House.

Masumpa Sokapase: I support what has been said by Ntantala. The Great House and its Qadi are one and the same. The Right Hand House has its own head. According to Native Custom there is nothing to go over that house.

C. W Monakali: My opinion is different. If there is no son in a house and a family meeting is held and they are all in agreement, in regard to the appointment, such appointment

would be in accordance with Native Custom. If the family is agreeable a father can take any son and place him in a house which has no son.

Geofjrey Reve: If a father appoints an heir at a meeting of relatives and there is no objection the appointment will be in order.

Robert Soshankana: If the family at the meeting accepts what the head of the kraal says, it becomes law.

SOUTHERN NATIVE APPEAL COURT.

MAKALIMA *v.* SIPAMLA AND ANOTHER.

N.A.C. CASE No. 22 OF 1954.

KOKSTAD: 8th June, 1954. Before Warner, Acting President, Kelly and Ahrens, Members of the Court.

HLUBI CUSTOM.

Hlubi Nat've custom—Damages for seduction and pregnancy—Pregnancy reported within a reasonable time—Prejudice by lateness of reporting cannot be complained of after acceptance of statement and payment of cattle demanded—Having paid sidwangu beast defendant liable to pay ba.ance of five head of cattle.

Practice and procedure: Evidence of admission and girl's testimony as to her seducer should be accepted.

Summary: Plaintiff, Gideon George Makalima sued defendants, Ben and Lionel Sipamla jointly and severally for six head of cattle or their value £60 for the seduct.on and pregnancy of his daughter, Elaine, second defendant being sued as head of the kraal where first defendant resides.

Held:

(1) In view of the provisions of section *eleven* of Act No. 38 of 1927 as amended by section *five* of Act No. 21 of 1943, this case must be decided accord.ng to Hlubi Custom.

(2) Plaintiff reported the pregnancy to defendants within a reasonable time after he became aware of it and told them that his daughter was seven months pregnant. They accepted the statement and paid the cattle demanded so that they cannot, at this stage, complain that they were prejudiced by the lateness in reporting.

(3) Plaintiff's evidence in regard to first defendant's admission of responsibility should be accepted.

(4) In view of the admission by first defendant and the authorities quoted the Native Comm'ssioner should have accepted the girl's ev'dence that first defendant seduced and rendered her pregnant.

(5) Having paid one sidwangu beast defendants are liable under Hlubi custom for payment of the balance of five head of cattle.

Cases referred to:

Manakanza *v.* Mhaga, 1 N.A.C., 213 (S), 217.
Mapheleba *v* Gaula, 1943. N.A.C. (C. & O.), 21.
Thai *v.* Cekata, 1943, N.A.C. (C. & O.), 23.

Tsoali *v.* Lebenya, 1940, N.A.C. (C. & O.), 22.
Gcwabe *v.* Mqilingwa, 1944, N.A.C. (C. & O.), 87.
Ngxagana *v.* Halam, 1940, N.A.C. (C. & O.), 59.
Maphanga *v.* Koza and Another, N.A.C. (S) 204.
McDonald *v.* Stander, 1935, A.D. 325.
Keza *v.* Ndaba, 1935, N.A.C. (C. & O.), 64.

Statutes referred to: Act No. 38 of 1927 section *eleven* as amended by section *five* of Act No. 21 of 1943.

Appeal from the Court of the Native Commissioner, Mount Fletcher.

Warner (Acting President):—

Plaintiff cla med from defendants, jointly and severally, second defendant being sued as head of the kraal at which first defendant resides, six head of cattle or their value £60. He alleged that, during December, 1953, first defendant wrongfully and unlawfully seduced and rendered pregnant plaintiff's daughter, Elaine.

In their plea, defendants admitted that first defendant is an inmate of the kraal of which second defendant is the head but denied that first defendant had seduced plaint ff's daughter, Elaine, and rendered her pregnant. They pleaded further that even if the Court were to find against them on the facts, they would be liable to plaintiff for five head of cattle or their value £50 in Native Law and Custom.

After hearing evidence, the Native Commissioner gave judgment of absolution from the instance with costs and plaint.ff has appealed on the following grounds:—

1. The judgment is against the weight of evidence adduced, and is not in accordance with, but opposed to, the legal princ.ples applicable thereto.
2. The judgment is contrary to law in that certain inadmissible evidence was adduced which swayed the Court in arriving at the judgment which it eventually gave in these two cases joined together as one.
3. The defendant, Lionel Sipamla, having admitted in his evidence that he had had carnal intercourse with plaintiff's daughter, Elaine, the evidence on the quest on of the paternity of the child born thereafter, given by the mother, the said Elaine, should have been preferred to that of the said Lionel, the defendant.
4. That the judgment in these two cases heard as one, should have been one in favour of the plaintiff.

Plaintiff's daughter, Elaine, says that first defendant, a student at Healdtown, who was at home for the holidays, slept with her in her room for the first time on 13th December, 1952, when he seduced her. After that they had intercourse on about six occas ons. At the end of December she missed her periods and informed first defendant of this before he returned to school in January, 1953. She gave birth on 28th August, 1953, and declares that first defendant is the father of her child.

Plaintiff says that he became aware of his daughter's condition during June, 1953 and on the 8th July, 1953, he went to defendants' kraal to demand damages. He did not go before because second defendant was away from home. On the lastmentioned date he spoke to both defendants and first defendant admitted that he had had sexual intercourse with plaint.ff's daughter and had made her pregnant.

It is common cause that on the following day, second defendant came to plaintiff's kraal and signed a document in which liabil.ty for damages was admitted. Two days later, second defendant again came to plaintiff's kraal. He was accompanied by other men and was driving seven head of cattle. These cattle were offered to plaintiff who accepted them. Second defendant stated

that first defendant wished to marry plaintiff's daughter and plaintiff agreed to this proposition. Second defendant stated that he had not obtained a permit for the removal of the cattle. One of these cattle was then slaughtered as the *sidwangu* beast. The spleen of the slaughtered beast was handed to second defendant to be taken to the dipping authorities and he was told to take the other six head home and bring them back when he had obtained a permit for their removal. Afterwards second defendant retracted from his promise to pay damages.

First defendant says that in December his uncle told him that the girl, Elaine, was in love with him. On the night of the 12th of that month he was at a concert and his uncle told him that the girl was in a certain hut and everything had been arranged for him. He went to the hut and found the girl there but did not have intercourse with her. He says that he had intercourse with her for the first time on 26th December and then had intercourse with her again on three or four occasions after that. He says that Elaine did not tell him that she was pregnant and he learned when he came home from the holidays in July that she was blaming him for her condition. The Native Commissioner has accepted Elaine's statement that the first intercourse took place on 13th December, 1952, and rejected first defendant's statement that it was on the 26th of that month.

If first defendant had intercourse with Elaine in December, 1952, it would not be impossible for him to be the father of the child born to her on 28th August, 1953. Elaine says that she had her menstrual periods for the last time before pregnancy on 28th November, 1952. The Native Commissioner has accepted her evidence as to when the first intercourse took place and rejected that of first defendant but has not accepted Elaine's statement that first defendant is the father of her child, in spite of the accepted rule that an admission by defendant of intercourse at the time when conception took place casts the heavy onus on him of proving that it was impossible for him to be the father. [Manakaza *v.* Mhaga, 1 N.A.C. 213 (S)]. First defendant has not given or produced evidence to show that Elaine was already pregnant or that she was not a virgin when he had intercourse with her for the first time.

The Native Commissioner seems to have absolved defendants for two reasons; firstly, because action was taken on the 8th July, 1953, about seven weeks before the birth of the child and secondly because in certain letters written by Elaine to first defendant after his return to school, which were produced in Court, she did not mention her pregnancy.

He has accepted plaintiff's statement that he became aware of Elaine's condition for the first time at the beginning of the schoolholidays in June. Presumably, he has also accepted his statement that he did not take action immediately because second defendant was away.

The Native Commissioner has quoted the case of Mapheleba *v.* Gaula, 1943, N.A.C. (C. & O.), 21, in which it was stated that, if the report of the pregnancy is not made to the seducer, the father cannot claim damages even if the intercourse was admitted. That case dealt with the position where no report of the pregnancy was made but damages were claimed after the birth of the child. In the case of Thai *v.* Cakata, 1943, N.A.C. (C. & O.), 23, where plaintiff became aware of his daughter's condition when she was seven months pregnant and there was a delay of 14 days in reporting the pregnancy to defendant, it was held that plaintiff was not debarred from claiming damages.

These cases were decided according to Basuto custom which differs from the customs of other tribes because the Basutos do not practise the custom of *unkumetsha* [see case of Tsoali *v.* Lebenya, 1940, N.A.C. (C. & O.), 22]. The Native Commissioner says that the parties are Hlubis but defendants live in a location

under a Basuto Chief though it is predominantly occupied by Pondomise. This does not appear from the record but it is admitted in this Court that the parties are Hlubis. In view of the provisions of section *eleven* of Act No. 38 of 1927, as amended by section *five* of Act No. 21 of 1943, this case must be decided according to Hlubi custom [see case of Gcwabe *v.* Mqilingwa, 1944, N.A.C. (C. & O.), 87].

Plaintiff reported the pregnancy to defendants within a reasonable time after he had become aware of it and told them that his daughter was seven months pregnant. They accepted the statement and paid the cattle demanded so that they cannot, at this stage, complain that they were prejudiced by the lateness in reporting.

Plaintiff says that when he reported the pregnancy first defendant admitted that he was responsible. The latter denies this and says that when it was said that the girl was seven months pregnant he knew that he could not have caused her pregnancy but second defendant paid the cattle in spite of his denial. The Native Commissioner does not say which version he accepted but he has accepted plaintiff's statement in regard to other matters while he has rejected first defendant's statement that he did not have intercourse with Elaine on the first occasion when he went to her room at night, so it seems to me that plaintiff's evidence in regard to the admission should be accepted.

Elaine says that she wrote letters other than those produced by first defendant in which she mentioned her pregnancy but first defendant has not produced them. The Native Commissioner seems to be under the impression that, if first defendant had made her pregnant, she would have mentioned her condition in all her letters to him. Elaine says that, in April, 1953, she consulted a Medical Practitioner who confirmed that she was pregnant but she did not mention this to first defendant because she did not want to interrupt his studies.

Elaine admits that she fell in love with a man named Gcwabe but says that this was after she was pregnant by first defendant. She also admits that she wrote a love letter to Gcwabe but says she did so because first defendant refused to marry her. There is no evidence, however, that she was intimate with this man at about the time when she conceived. Even if it had been shown that the woman had been carrying on with more than one man at the time she conceived, great weight must be given to her statement fixing the paternity of the child (see case of Manakaza *v.* Mhaga, supra page 217).

The following passage taken from the judgment in the case of Mgxagana *v.* Halam, 1940, N.A.C. (C. & O.), at page 59, was quoted in the case of Maphanga *v.* Koza and Another, 1 N.A.C. 204 (S):—

> "Moreover, even if it be accepted that another man had intercourse with the girl, her indication of the father is accepted by our law once the plaintiff admits sexual intercourse with the girl, though he may deny having emitted semen into her—see McDonald *v.* Stander, 1935, A.D. page 325, where the Roman Dutch authorities are assembled and the rule followed that this is so even if the girl gives birth one month after intercourse or one year thereafter."

In the present case, the Native Commissioner has pointed out what he regards as unsatisfactory features of the girl's evidence but he has not rejected her evidence as being palpably false nor does he say that she is unworthy of belief. In my opinion, he should, in view of the admissions by first defendant and the authorities quoted have accepted her statement that he seduced her and made her pregnant.

In the case of Kesa *v.* Ndaba, 1935, N.A.C. (C. & O.), 64, it was stated that six head of cattle are payable under Hlubi custom for seduction whether or not followed by pregnancy. Defendants have paid one beast and are therefore liable for payment of the balance of five head of cattle.

The appeal should be allowed with costs and the judgment of the Court below altered to read:—

"For plaintiff against both defendants, one paying the other to be absolved to the extent of such payment, for five head of cattle or their value £50 and costs."

Kelly (Member): I concur.
Ahrens (Member): I concur.
For Appellant: Mr. Gordon, Mount Fletcher.
For Respondent: Mr. Walker, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

NOPANJWA *v.* **MHLAMBISO.**

N.A.C. CASE No. 23 OF 1954.

UMTATA: 17th June, 1954. Before Warner, Acting President, Bates and Nel, Members of the Court.

LAW OF DELICT.

Damages for defamation—no action under Native Law except where there has been an imputation of witchcraft under common law—defamatory per se *to say of a man that he has had carnal connection with another man's wife.*

Practice and procedure—General damages—not limited to pecuniary loss proved—some damages must be awarded in all cases of proved defamation—Appeal Court not entitled to vary damages where no principle of law violated.

Summary: Plaintiff sued defendant for £50 general damages for defamation.

Held:

(1) The Native Commissioner found as a fact that defendant in the presence of others used words which can have one meaning—that plaintiff had committed adultery w.th defendant's wife and was justified in doing so.

(2) As there is no action for defamation under Native law, except where there has been an imputation of witchcraft it is presumed that the claim was brought under Common Law where it is defamatory *per se* to say of a man that he has had carnal connection with another man's wife.

(3) As General damages were claimed, the amount awarded is not limited to the pecuniary loss proved and it is established law that some damages must be awarded in all cases of proved defamation. The fourth ground of appeal must fail.

Held further:

(1) Defendant in his defamatory statement not only attacked plaintiff's character but also attacked his conduct as headman by accusing him of committing adultery with defendant's wife while pretending to carry out his duties by taking her to the office of the Native Commissioner to lodge a complaint.

(2) It has been stated that an appeal court is not entitled to vary a judgment as to damages if that judgment violates no principle of law and is neither extravagant nor unreasonable, even though the appeal court does not agree therewith.

Cases referred to:

Henwood *v.* Sposato 1950 (2) P.H. J10.
V.d. Merwe *v.* Schraader 1953 (2) S.A. 339 (E).

Works referred to:

Seymour's Native Law in S.A. p. 187.
Whitfield's S.A. Law Second edition, p. 412.
Nathan's Law of Defamat on, p.p. 60, 174.
Jones & Buckle, 4th edition, p. 158.

Appeal from the Court of the Native Commissioner, Cofimvaba.

Warner (Acting President):—

Plaintiff sued defendant for £50 as damages for defamation and filed the follow ng particulars of claim:—

1. The parties are Natives as defined by Act No. 38 of 1927.

2. On a certain day during June, 1953, and at the kraal of one Solomon Daba in the said location, and in the presence of the said Solomon Daba, and Ngalubomvu Ntlabati and Jessie Nopanjwa, the defendant wrongfully and unlawfully, falsely and maliciously spoke of and concerning the plaintiff the following defamatory words in the Xosa language, namely:—

> "Ulapa Uti Us'sibonda? Utata Mmfazi Wam usitiumsa Kumantyi ku Cofimvaba kanti ulala naye apa emlanjeni ku Cofimvaba pakati kweminga.";

which words being interpreted into the English language read:—

> "You are here and you call yourself a Headman? You take my wife under the pretence that you are taking her to the Magistrate at Cofimvaba, and yet you have connection with her at the Cofimbava river amongst the mimosa trees."

3. By reason of the said false and defamatory words the plaintiff has been greatly injured in his good name, fame and reputation and has sustained damages in the sum of £50, which, legal demand notwithstanding the defendant neglects to pay.

Defendant pleaded as follows:—

1. Paragraph 1 of Plaintiff's Summons is admitted.

2. (*a*) Defendant denies paragraph 2 of Plaintiff's Summons.

(*b*) (i) Alternatively if the said words were uttered at all, which is denied, they were not uttered wrongfully or unlawfully and are not malicious, defamatory or false.

(ii) Alternatively they were published by the defendant without malice in the bona fide belief that they were true and that they were uttered under such circumstances as to make them a privileged communication.

(iii) Alternat.vely in their natural meaning the words complained of in so far as they express statements of fact are true in substance and in fact and, in so far that they express matters of opinion, are a fair and honest comments on a matter of public interest, and they were published without malice and in the public interest.

(iv) Alternatively that they are true and were published in the public interest

3. Paragraph 3 is denied and defendant more especially denies that plaintiff has suffered any damages or alternatively that there is any connection between the alleged defamation and the alleged damages.

After hearing evidence the Assistant Native Commissioner gave judgment for plaintiff for £35 and costs. Defendant has appealed against this judgment on the following grounds:—

1. That the judgment is against the weight of evidence and the probabilities of the case.
2. That the presiding judicial officer erred in his finding that the words complained of were ever uttered at all inasmuch as plaintiff failed to prove this.
3. That in any event the plaintiff, now respondent, failed to prove that the words complained of were and are defamatory and that therefore the presiding judicial officer erred in finding that they are defamatory.
4. That in any event the plaintiff, now respondent, failed to prove that he had suffered any damages.
5. That the damages awarded are excessive.

Defendant made no attempt to prove his alternative plea contained in paragraph 2 of his plea.

It is common cause that, on a certain day in June, 1953, plaintiff, who is headman in the location in which the parties reside, was sitting in a hut at the kraal of Solomon Ndaba with Solomon Ndaba and Mgalibomvu Mhlabati when defendant entered the hut. It is also common cause that defendant's wife had complained to plaintiff that defendant was not supporting her and plaintiff had taken her to the office of the Native Commissioner at Cofimvaba so that her complaint could receive attention.

Plaintiff says that after defendant had entered the hut he said: "You who say you are a headman you keep on taking my wife saying that you take her to the magistrate and yet you sleep with her near the river." Solomon Ndaba says that the words used by defendant were: "You take my wife to the magistrate and yet you sleep with her amongst the mimosa trees near the bridge." Ngalibomvu Mhlabati deposes that defendant said: "You who allege that you are a chief, you keep on taking my wife to town and sleep with her under the mimosa trees."

Defendant says that when he entered the hut Solomon asked from where he had come and he replied that he had been to Kroli's kraal to look for his wife and had quarrelled with Kroli. Plaintiff said that he should not talk about Kroli who was not present and in the course of an argument he (defendant) said: "This is my wife. Maybe you have something to do with her. If that is so maybe she is now yours."

Defendant says that Solomon has made a false statement in support of plaintiff because he (Solomon) is in illegal occupation of a land but he has not given any reason why Ngalibomvu should give false evidence against him.

The Assistant Native Commissioner has found as a fact that defendant, in the presence of others, used words which can have one meaning only, viz.: That plaintiff had committed adultery with his (defendant's) wife. In my opinion, he was justified in doing so. Grounds *one* and *two* of the Notice of Appeal must, therefore, fail.

The Assistant Native Commissioner does not state whether he tried the case under Common Law or Native Law. As, however, there is no action for damages for defamation under Native Law, except where there has been an imputation of witchcraft, it must be presumed that this claim was brought under Common Law (Seymour's Native Law in South Africa, page 187: Whitfield's South African Law, second edition, page 412). Under Common Law it is defamatory *per se* to say of a man that he has had carnal connection with another man's wife (Nathan's Law of Defamation, page 60), so the third ground of appeal must also fail.

Plaintiff claimed general damages so that the amount awarded is not limited to the pecuniary loss that he is able to prove (Nathan's Law of Defamation, page 174). It is established law that some damages must be awarded in all cases of proved defamation [Henwood *v.* Sposato, 1950 (2), P.H. J. 10]. The fourth ground of appeal must fail.

It becomes necessary to consider the amount of damages awarded. Plaintiff is headman and therefore a man of standing in the community. Defendant in his defamatory statement not only attacked plaintiff's character but he also attacked his conduct as a headman as he accused him of committing adultery with his (defendant's) wife while pretending that he was carrying out his duties by taking her to the office of the Native Commissioner. Publication was made to three or four persons inside a hut but in the case of Van der Merwe *v.* Schraader, 1953 (2) S.A. 339 (E), in which publication was made to two persons, employees of plaintiff, the learned judge stated: "They (the words) were uttered to a limited audience, and though the fact that the audience did not believe them cannot deprive plaintiff of his action, yet as regards injury this may be considered, but is rather a small factor." In that case an amount of £100 was awarded as damages. It has been argued that a Native man who commits adultery does not suffer in his reputation among other Natives but plaintiff states (and his statement has not been contradicted), that defendant's wife is his niece. This means that, if he committed adultery with her, he also committed incest, a heinous offence in the eyes of the Natives. It has been stated that an Appeal Court is not entitled to vary a judgment as to damages if that judgment violates no principle of law and is neither extravagant nor unreasonable, even though the appeal court does not agree therewith (see cases quoted on page 158, Jones & Buckle, fourth edition).

The present judgment does not violate any principle of law and the amount awarded is not extravagant or unreasonable so the appeal should be dismissed with costs.

Bates (Member): I concur.

Nel (Member): I concur.

For Appellant: Mr. Gray Hughes, Umtata.

For Respondent: Mr. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

ZILWA *v.* GAGELA.

N.A.C. CASE No. 21 OF 1954.

UMTATA: 17th June, 1954, before Warner, Acting President, Bates and Nel, Members of the Court.

LAW OF SUCCESSION.

Native custom—Estate—Ubulungu cattle the property of the husband and forms part of his deceased estate—Widow no right to dispose of estate assets without heir's permission.

Practice and procedure: Question of costs should be held over until conclusion of case.

Costs: Each party partially successful—Should pay own costs in Lower Court.

Summary: Plaintiff, the nephew and heir of the late Milton Zilwa claimed four head of cattle or the value £60 and various articles forming the assets of the late Milton Zilwa's estate from the defendant, the father of deceased's widow Adelaide who it is alleged returned to defendant's kraal after Milton's death together with the assets claimed.

Held:

(1) The uncorroborated statement that the four head of cattle of Milton's estate were seen in defendant's possession is insufficient proof of the allegation.

(2) Defendant's admission of possessing three head of cattle which were in deceased's possession when he died casts the onus of justifying his possession on defendant.

(3) Defendant's claim that the ubulungu beast belong to the daughter and its progeny to the father cannot be sustained as these are the property of the husband and form part of his estate on his death.

(4) As no evidence was brought by plaintiff in regard to the value of the cattle, the value stated in the summons should be accepted.

(5) It was incorrect to grant costs in the judgment for absolution from the instance in respect of items other than the cattle at the close of plaintiff's case. The question of costs should be held over until the conclusion of the case.

Statutes referred to: Act No. 38 of 1927, section *fifteen.*

Works referred to: Whitfield's S.A. Native Law, 2nd edition, page 107.

Appeal from the Court of the Native Commissioner, Cala.

Warner (Acting President):—

Plaintiff is the heir to the estate of the late Milton Zilwa and defendant is father of Adelaide, widow of deceased, Milton. Adelaide has remarried. Plaintiff alleges that, after the death of Milton, Adelaide returned to the kraal of defendant taking with her four head of cattle and certain articles which are in possession of defendant. The plea is a denial of these allegations.

Plaintiff's witness, Alton Zilwa, stated that he had seen in the possession of defendant four head of cattle belonging to Milton's estate but no evidence was brought to prove that the other assets claimed were in the possession of defendant. At the close of plaintiff's case, defendant's attorney applied for absolution from the instance in respect of all items claimed by plaintiff in his summons with the exception of the item: "4 head of cattle or their value £60". The Assistant Native Commissioner then made the following note on the record: "Application granted with costs". Defendant then brought evidence in regard to the claim for four head of cattle and at the close of his case the Assistant Native Commissioner gave judgment for defendant in respect of his claim with costs.

Plaintiff has appealed against this last-mentioned judgment on the following grounds:—

1. That the judgment is against the weight of evidence and is not supported thereby.
2. That the Assistant Native Commissioner erred in holding—
   (*a*) That two of the cattle claimed, which he found to be ubulungu cattle, do not form portion of the estate of the late Milton Zilwa.
   (*b*) That plaintiff is not entitled to the beast which Adelaide, the widow of the late Milton Zilwa, alleges she sold.
   (*c*) That the late Milton Zilwa had during his lifetime sold, as alleged, any of the cattle of which he died possessed.

Alton Zilwa claims to know deceased's cattle. He states that in 1949 Milton had six head of cattle, that one was sold when he was sick and one was killed when he died, leaving four head which he (the witness) has seen in defendant's possession. The witness admits, however, that he has been absent at work on frequent occasions.

According to the defence evidence, deceased had eight head of cattle shortly before his death. During his last illness, one beast was sold on his instructions and one beast was slaughtered at the time of his funeral. Of the remaining six head of cattle, three are in possession of a man named Bill Mandla who claims to have bought them and three are in possession of defendant.

In view of the evidence of the defence witnesses, which the Assistant Native Commissioner accepted, the uncorroborated statement of Alton that he saw four head of cattle belonging to Milton's estate in possession of defendant, is insufficient proof of this allegation. On the other hand, defendant admits that he has in his possession three head of cattle which were in possession of deceased when he died. The onus is on him, therefore, to justify his possession of these three head of cattle.

Defendant says that two of the cattle represent an "*ubulunga*" beast which he gave to his daughter, and it's progeny. He claims that such a beast belongs to the daughter and the progeny belongs to her father. This claim cannot be sustained as it has been held on numerous occasions that "ubulunga" cattle are the property of the husband and, on his death, form part of his estate (Whitfield's S.A. Native Law, second edition, page 107).

In this Court, Mr. Gibson has stated that Adelaide and deceased Milton were married by civil rites, community of property being excluded in terms of section *twenty-two* (6) of Act No. 38 of 1927. He has argued that the beast was a gift to Adelaide and became her property and did not form portion of the estate. This point was not raised in the lower Court and, in any case, defendant did not say that he had given the beast as a present to Adelaide but stated that it was an "ubulunga" beast. This being the case, he must be regarded as having paid the beast under this custom in terms of which the beast becomes the property of the husband and forms portion of his estate.

According to Adelaide, Milton, before his death, sold the third beast to Shadrack Danya for £4. Shadrack paid £3. 5s. and it was agreed that the beast would be delivered to him when he paid the balance. After Milton's death Shadrack told Adelaide that he wished to cancel the sale. She then obtained £3. 5s. from defendant and paid it to Shadrack. After that she sold the beast to defendant for £4. As the beast was not delivered to Shadrack it remained the property of Milton and formed portion of his estate. Adelaide had no right to dispose of it without the permission of Milton's heir, and the alleged sale to defendant would be invalid.

Plaintiff is entitled to judgment for the three head of cattle in defendant's possession. In his summons, plaintiff placed a value of £15 each on the cattle. In his evidence, Alton stated that their value was £18 each. Defendant has not given any evidence in regard to the value of the cattle so the value stated in the summons should be accepted.

At the close of plaintiff's case the Assistant Native Commissioner gave judgment of absolution from the instance in respect of items other than the cattle and costs. This was incorrect. He should have granted the judgment of absolution but should have held over the question of costs until the conclusion of the case. If the judgment at the close of defendant's case is altered to one for plaintiff for three head of cattle and costs in respect of this claim, difficulty would be experienced in deciding which costs were incurred in respect of this claim and which

costs were incurred in respect of the other items claimed. There is no appeal against the judgment delivered at the close of plaintiff's case, but I consider that, under the wide powers granted to it by section *fifteen* of Act No. 38 of 1927, this Court can amend it. As each party has been partially successful in the action in the lower Court I consider that he should pay his own costs in that Court.

The appeal should be allowed with costs, the judgments given on 16th February, 1954 and 17th February, 1954, should be deleted and the following substituted: "For plaintiff for three head of cattle or their value £45. Absolution from the instance in regard to balance of claim. Each party to pay his own costs."

Bates (Member): I concur.

Nel (Member): I concur.

For Appellant: Mr. Mda, Mqanduli.

For Respondent: Mr. Gibson, Engcobo.

SOUTHERN NATIVE APPEAL COURT.

MHLONYANE *v.* MFENE.

NATIVE APPEAL COURT CASE No. 20 OF 1954.

UMTATA: 18th June, 1954. Before Warner, Acting President, Bates and Nel, Members of the Court.

LAW OF DELICT.

Native Custom—Damages for adultery and pregnancy—Evidence—Insufficiently strong to establish plaintiff's allegation that defendant caused wife's pregnancy—Defendant's responsibility not proved.

Summary: Plaintiff claimed the usual damages from defendant for committing adultery with his customary wife, Notshilisi, who gave birth to a child of which plaintiff could not possibly be father owing to his absence at work. Defendant pleaded denial of liability. After hearing evidence judgment for defendant with costs was granted against which plaintiff appealed on the grounds that it was against the weight of ev.dence and probabilities of the case.

Held: That Native Commissioner's finding is not convincingly wrong but he has not stated that he found as a fact that defendant has established that he is not the man who rendered her pregnant.

Held further: Plaintiff should not be barred from bringing fresh action if he should be able te bring stronger evidence.

Appeal from the Court of the Native Commissioner Mqanduli.

Warner (Acting President).

Plaintiff alleged that defendant committed adultery with his customary wife Notshilisi causing her to become pregnant and claimed the usual damages.

Defendant's plea was a denial of liability. After hearing evidence the Assistant Native Commissioner gave judgment for defendant with costs and plaintiff has appealed against this judgment on the ground that it is against the weight of evidence and probabilities of the case.

It is common cause that in 1953 Notshilisi gave birth to a child and that owing to his absence at work, it is impossible for plaintiff to be the father of that child.

Notshilisi says that plaintiffs kraal is in Umtata district and in 1952 she went to stay with her people in Mqanduli district. There she slept in the hut occupied by Nowesile her step-mother. Defendant who married her cousin resides close to her people's kraal and she used to meet him on the commonage. He proposed love to her and finally she accepted him. He used to come to her hut at night and ask for tobacco. She would go to the door and then go out and she and defendant would sleep together in the grass behind the kraal. In December, 1952, she found that she was pregnant. He suggested that she should go to another kraal and she did so. He visited her occasionally but eventually stayed away so she returned to her people's kraal. Her pregnancy was discovered and the "stomach" was taken to defendant's kraal. This evidence is supported by that of Nowesile who says that defendant would come to the hut and ask for tobacco. Notshilisi would go to him outside and would not return until late at night or early next morning. No evidence was called to support Notshilisi's statement that defendant visited her when she went to another kraal.

Defendant denies that he caused Notshilisi's pregnancy. He admits that he used to meet her and talk to her. He also admits that they were on friendly terms and that when he passed the kraal he would ask for tobacco but says that he never passed the kraal at night.

The Assistant Native Commissioner has found that the evidence is not sufficiently strong to establish plaintiff's allegation that defendant is the person who caused the pregnancy of his wife. I am not convinced that this finding is wrong. On the other hand, the Assistant Native Commissioner does not state that he found as a fact that defendant has established that he is not the man who rendered plaintiff's wife pregnant. In view of this, plaintiff should not be barred from bringing a fresh action if he should be able to bring stronger evidence.

The appeal should be dismissed with costs but the judgment of the Court below altered to one of absolution from the instance with costs.

Bates (Member): I concur.

Nel (Member): I concur.

For Appellant: Mr. Mda, Mqanduli.

For Respondent: Mr. Gray Hughes, Umtata.

SOUTHERN NATIVE APPEAL COURT.

PANTSHWA *v.* **BETYENI.**

N.A.C. CASE No. 10 OF 1954.

UMTATA: 18th June, 1954. Before Warner, Acting President, Bates and Nel, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Application for condonation of late noting of appeal from Chief's Court—Appeal not noted in terms of the Rules—Chief's reasons not furnished—Note on document giving particulars of judgment and made prior to notification of noting of appeal must be ignored—Unnecessary

for plaintiff to file replying affidavit—Native Commissioner must decide whether good cause for extending prescribed period for noting appeal shown—Ignorance of legal practice and procedure is not good cause for delay—Chief's reasons do not disclose manifest injustice.

Summary: This case involves a claim for three head of cattle or their value, £30, as damages for adultery in which judgment was obtained by plaintiff (Ntinaye Betyeni) in a Native Chief's Court for the amount claimed on 14th February, 1953, which judgment was registered by the Clerk of the Court, Mqanduli on the 18th March, 1953. On the 18th May, 1953, defendant (Mzamo Joseph Pantshwa) filed an affidavit requesting condonation of late noting of appeal on the grounds of a misunderstanding between his attorney and himself and on 23rd May, 1953, Notice of Application supported by the application was served on the plaintiff and Clerk of the Court. When the application came up for hearing on 15th July, 1953, it was *ex parte* opposed by plaintiff's attorney in Court on the grounds that it did not contain grounds which entitled defendant to the Court's indulgence and after argument the application was granted, an appeal noted, the case set down and after several postponements and on 2nd November, 1953, the trial commenced as if it were one of first instance. After hearing evidence the appeal was upheld and the Chief's judgment altered to one for defendant with costs. Plaintiff appealed against this judgment.

Held:

(1) The appeal has not been noted in terms of the rules promulgated in Government Notice No. 2885 of 1951. Defendant did not notify the Clerk of the Court of his intention of appealing in terms of Rule 9 and the Clerk of the Court did not issue a notice in terms of Rule 10 (*c*) or notify the Chief who heard the case in terms of Rule 10 (*d*).

(2) The Chief did not furnish any reasons after notification that an appeal had been noted and the note on the document giving particulars of judgment, having been made before receipt of any notification that an appeal had been noted, must be ignored.

(3) It is not necessary for plaintiff to file replying affidavits in terms of Rule 9 (3). The Native Commissioner is required to decide whether defendant's affidavit showed that there was good cause for extending the period prescribed for noting the appeal.

(4) The expression of opinion that ignorance of legal practice and procedure is not good cause for delay is especially so when the applicant has consulted an attorney.

(5) Defendant failed to show that there was just cause for delay in noting the appeal. He did not allege in his affidavit that the judgment was wrong, giving reasons, and the particulars furnished by the Chief do not disclose a manifest injustice.

(6) The Chief who had before him the usual evidence in a case in which damages are claimed for adultery, including the production of the "Ntlonze" cannot be said to have committed a manifest injustice in accepting the evidence of plaintiff and his witnesses.

Appeal from the Court of the Native Commissioner, Mqanduli.

Warner (Acting President):—

Ntinaye Betyeni (whom I shall refer to as plaintiff) obtained judgment for three head of cattle or their value, £30, as damages for adultery in the Court of Chief Dabulamanzi, against Mzamo

Joseph Pantshwa (whom I shall refer to as defendant) on the 14th February, 1953. On the 18th March, 1953, the judgment was registered by the Clerk of the Court, Mqanduli.

On the 18th May, 1953, defendant deposed to the following affidavit:—

"1. That on Saturday, the 14th day of February, 1953, judgment was given against me by Chief Dabulamanzi Mtirara in an action wherein respondent sued me for 3 head of cattle for damages for simple adultery.

2. On Monday, the 16th day of February, 1953, I instructed Mr. Attorney J. A. Starke, of Elliotdale, to note an appeal on my behalf against the said judgment.

3. On that date Attorney Starke wrote a letter to the Chief noting an appeal and asking for reasons for judgment.

4. That to the best of my knowledge and belief Attorney Starke received no reply from the Chief.

5. Although Mr. Starke informed me that the case would have to be taken by an Mqanduli Attorney, I understood that the fact that he had noted an appeal with the Chief was a sufficient noting of appeal.

6. I was awaiting set down of the appeal when the Chief's messengers attached 4 head of cattle from me on Monday, 11th May, 1953, and I ascertained that appeal had not been noted with the Clerk of the Court, Mqanduli.

7. The failure to note an appeal timeously was due to a misunderstanding of Mr. Starke's instructions by me, as he had handed me a copy of his letter to the Chief on 18th March, 1953, which I was to file in connection with a criminal charge against me relating to the sore back of a horse which figured as 'ntlonze' in the alleged 'catch'.

8. I was not wilfully in default and hereby crave the indulgence of this Court for a condonation of my late noting of appeal."

On the 21st May, 1953, Mr. Wilkins, defendant's attorney, issued the following notice addressed to the Clerk of the Court, Mqanduli, and to plaintiff:—

"APPLICATION FOR CONDONATION.

Be pleased to take notice that in terms of Section 9 (3) of Government Notice No. 2885, dated 9th November, 1951, application will be made to the Native Commissioner of Mqanduli on Wednesday, the 4th day of June, 1953, at 10 o'clock in the forenoon, for condonation of Appellant's late noting of appeal against a judgment of Chief Dabulamanzi Mtirara wherein judgment was given against Appellant for 3 head of cattle in an action wherein Appellant was sued by Respondent for damages for adultery.

The attached affidavit will be used in support of the said applicaion."

According to an endorsement on this notice it was served by a messenger in the employ of Mr. Attorney A. L. Wilkins on plaintiff on the 23rd May, 1953.

The record does not disclose what happened on the 4th June, 1953, but on the 15th idem the matter came before Court when Mr. Attorney Mda appeared on behalf of plaintiff and Mr. Attorney Wilkins on behalf of defendant. Mr. Mda did not submit replying affidavit but stated that he opposed the application on the ground that the affidavit made by plaintiff did not contain grounds which entitled him to the Court's indulgence. After hearing argument, the Native Commissioner made the following

order: "The application for condonation of late noting of the appeal is granted. Applicant to file a notice of appeal within seven days."

On the 22nd June, 1953, Mr. Wilkins addressed the following letter to the Clerk of the Court:—

"I have been instructed by Mzamo Joseph, of Roza location, to note an appeal against the judgment of the Chief in the above matter on 14th February, 1953, wherein judgment was entered against Appellant for 3 head of cattle.

The appeal which is brought in terms of Section 9 (1) of Government Notice No. 2885, dated 9th November, 1951, in terms of Act 38 of 1927, is on the ground that the judgment is against the weight of evidence.

I enclose revenue stamps to the value of 5s. 6d., being noting appeal fee.

Please advise me in due course for which date the appeal has been set down."

The case was set down for hearing on 24th August, 1953. After several postponements it came before Court on the 2nd November, 1953, when the trial commenced as if it were one of first instance.

After hearing evidence the Native Commissioner, on the 14th December, 1953, gave the following judgment: "It is ordered that the appeal be upheld with costs, and the judgment of the court below is altered to one for defendant with costs".

Plaintiff has appealed against this judgment on the following grounds:—

"1. The judgment dismissing plaintiff's objection to the application for the condonation of late noting of appeal was bad in law and the objection should have been upheld.

2. Defendant having failed to file a notice of appeal within 7 days in terms of the grant of condonation of the late noting of appeal, the judgment of the Chief's court became non-appealable and irreversible.

3. The belated filing of a Notice of Appeal was therefore entirely nugatory and any proceedings based thereon consequently invalid.

4. The set down of the hearing of the case de novo, on the strength of a Notice of Appeal which was itself a nullity and on application heard in the absence of plaintiff and his attorney was highly irregular and extremely prejudicial to plaintiff.

5. That on the merits the judgment is against the whole weight of evidence, inter alia in that:

   (*a*) On the question of adultery and the catch, the evidence for plaintiff, which included independent testimony, squashed defendant's bare denial.

   (*b*) Defendant's facile explanation of his presence at plaintiff's kraal was as frivolous as it was ludicrous.

   (*c*) The alleged loan of money to plaintiff (a factor not precluding adultery) was too flimsy to warrant serious consideration, particularly in view of defendant's failure to call witnesses thereto, i.e. Fukama and Valiwe Mhlanganiso."

As was stated in the case of Mbata *v.* Ndhlalose 1952, (1) N.A.C. 18 (N.E.), the procedure to be followed when an application is made for extension of the period prescribed for noting an appeal, is that the appeal must be noted against the Chief's judgment and, either at the time of such noting or timeously thereafter, application must be made for the necessary extension of time to validate the late noting.

In the present case, the appeal has not been noted in terms of the Rules promulgated in Government Notice No. 2885 of 1951. Defendant did not notify the Clerk of the Court of his intention of apealing in terms of Rule No. 9 and the Clerk of the Court did not issue a notice in terms of Rule No. 10 (*c*) or notify the chief who heard the case in terms of Rule No. 10 (*d*).

When the Chief furnished particulars of the judgment in order that it might be registered, he added a paragraph giv ng reasons but he does not appear to have furnished any reasons for judgment after the appeal had been noted as he is required to do by Rule No. 11. According to the record Mr. Wilkins stated in Court: "I hand in the Chief's reasons for judgment in the matter." If these were reasons furnished by the chief after the appeal had been noted they have not been included in the record. If Mr. Wilkins was referring to the note made by the chief in the document furnishing particulars of the judgment it is difficult to understand how this document came to be in his possession. The chief has not furnished any reasons after notification that an appeal has been noted and, in my view, the note on the document giving particulars of the judgment, having been made before receipt of any notification that an appeal has been noted, must be ignored.

It was stated in the case of Magwaza *v.* Magwaza 1937 N.A.C. (N. & T.) 3 that the filing of the chief's reasons is essential. This statement has been repeated in several other cases. In the case of Zwane *v.* Sitoli 1947 N.A.C. (N. & T.) 30, it was stated that, in appeals from chief's courts the Native Commissioner must have before him a full statement of the cause of action before the chief, the chief's judgment and his reasons therefor and in the absence of these particulars, an appeal from the chief's court is never properly before the Court and it therefore follows that if a case is not brought properly subsequent proceedings are null and void.

The Native Commissioner has not stated why he condoned the late noting of the appeal except to say: "Mr. Mda for respondent put up no replying affidavit to Mr. Wilkins' application for condonation of late noting of the appeal from Chief Dabulamanzi's judgment. Mr. Mda merely made an *ex parte* statement from the floor of the court consequently his statement that the condonation (which was virtually unopposed) was bad in law and that the objection should have been upheld' is not understood."

It was not necessary for plaintiff to file a replying affidavit. The Native Commissioner was required to decide whether defendant's affidavit showed that there was good cause for extending the period prescribed for noting the appeal [see rule 9 (3)].

In his affidavit, defendant says that, on the 16th February, 1953, he instructed Mr. Attorney Starke to note an appeal on his behalf against the judgment and that Mr. Starke wrote a letter to he chief noting an appeal. There is no affidavit from Mr. Starke explaining why he wrote to the Chief instead of notifying the Clerk of the Court in terms of rule 9 (1). After the letter was written defendant took no further steps for about three months until an attachment was made. His main excuse seems to be that he was ignorant of the correct procedure to be adopted for he says that he understood that the fact that he had noted an appeal with the chief was a sufficient noting of appeal. In the case of Lekhetha *v.* Toane, 1946 N.A.C. (C. & O.) 22, Sleigh President stated that he did not think that ignorance of legal practice and procedure is good cause for delay. With respect, I agree with this expression of opinion especially when as in the present case, the applicant has consulted an attorney.

In the case of Jele *v.* Shangase, 1945, N.A.C. (N. & T.) 6, Stafford Acting President, after reviewing the authorities stated: "In the present case the chief had within a few days after the incident given a judgment in favour of the plaintiff. The Appeal Court heard the matter again after a lapse of fourteen months and because the plaintiff was unable again to prove his case to the full satisfaction of the Native Commissioner, he had to lose a valid judgment which he had obtained when the facts were clear in the minds of the witnesses. Reviewing the case from a wide aspect, there is no doubt that the appellant was prejudiced by the granting of the condonation and the Native Commissioner should not have lightly set aside a valid judgment unless it was clear that the judgment was wrong." A similar position obtains in the present case. The Chief gave a judgment in favour of the plaintiff within a few days after the incident. After a lapse of nine months, the Native Commissioner again heard the case and set the judgment aside, mainly because of discrepancies in the evidence of the witnesses.

Defendant failed to show that there was just cause for delay in noting the appeal. He did not allege in his affidavit that the judgment was wrong, giving reasons, and the particulars furnished by the Chief do not disclose a manifest injustice.

The claim was one of damages for adultery with plaintiff's customary wife Nolungile. This woman says that on a dark evening (a storm was brewing), defendant came to her hut and they went behind it and had sexual intercourse. As they got up a flash of lightning exposed them to the view of the plaintiff who had come home unexpectedly. Plaintiff says that he caught defendant who managed to escape, leaving his horse tied to the stock-kraal. Next morning defendant's hat, sjambok and pipe were found behind the hut. A neighbour, Bolilitye, says that he was called to plaintiff's kraal and, by the flashes of lightning, he saw plaintiff trying to catch defendant. Nolungile was calling to defendant to stop as he had been caught but he ran away. Defendant says that he went to plaintiff's kraal to collect an amount of 2s. which plaintiff owed him. Nolungile told him that plaintiff was inside the hut so he dismounted and entered. He found that plaintiff was not inside the hut so he left. When he got outside plaintiff struck him from behind saying that he had caught him. Bolilitye assisted plaintiff to assault him. He ran away. As he did so his pipe fell from his mouth and he dropped his hat and sjambok.

The Chief had before him the usual evidence in a case in which damages are claimed for adultery, including the production of the "Ntlonze". It cannot be said that he committed a manifest injustice in accepting the evidence of plaintiff and his witnesses.

I consider that the appeal should be allowed with costs and the judgment of the Native Commissioner deleted and the following substituted:—

Appeal dismissed with costs and the Chief's judgment sustained.

Bates (Member): I concur.

Nel (Member): I concur.

For Appellant: Mr. Mda, Mqanduli.

For Respondent: Mr. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

JIM *v.* POSWA AND ANOTHER.

N.A.C. CASE No. 15 OF 1954.

UMTATA: 21st June, 1954. Before Warner, Acting President, Bates and Nel, Members of the Court.

LAW OF SUCCESSION.

Native Custom—Estate—Dispute as to heirship.

Practice and Procedure—No presumption of paternity or legitimacy of child born prior to customary union—Onus on defendant to prove legitimacy.

Summary: This case concerns a dispute as to the heir of the late Jim Mahobe whose widow, Kate Jim, re-married Joseph Poswa and whose land and kraal-site were allotted to defendant, Washington Jim. Plaintiff (Kate Poswa and Sampson Jim) later took possession of the kraal-site and land and defendant sued for ejectment and damages.

Held: That there is no presumption of paternity or legitimacy of a child born before marriage. The onus was on defendant to prove his legitimacy.

Held further: By virtue of section *ten* of Proclamation No. 26/1936, if deceased had occupational rights to the allotment, plaintiff would have been entitled to remove the improvements within three months of deceased's death after which time no compensation is payable in respect thereof.

Cases referred to: Ndondo *vi* Ndondo, 1944, N.A.C. (C. & O.) 80.

Statutes referred to: Proclamation No. 26 of 1936, section *ten.*

Appeal from the Court of the Native Commissioner, Elliotdale.

Warner (Acting President):—

This case concerns a dispute as to who is the heir to the late Jim Mahobe. After deceased's death his widow married a man named Joseph Poswa and the land and kraal site were allotted to Washington Jim (hereinafter referred to as defendant). Later Kate Poswa and Sampson Jim (hereinafter referred to as the plaintiff) took possession of the kraal-site and land. Defendant sued for an order of ejectment and £20 damages. When the matter came before Court, Kate Poswa and plaintiff consented to judgment in favour of defendant for an order of ejectment and £7. 10s. damages. Judgment was entered accordingly.

Plaintiff also counter-claimed for (1) a declaration of rights as to heirship of the late Jim Mahobe; (2) compensation for 6 head of cattle at the rate of £10 each; (3) a debate of account regarding Jim Mahobe's estate and (4) £30 value of materials on kraalsite occupied by late Jim Mahobe. He alleged that he (plaintiff) was the eldest son and heir of the late Jim Mahobe, defendant being an illigitimate son of Kate born to her before her marriage to Jim, that defendant had used six head of cattle belonging to Jim's estate to pay his (defendant's) dowry and that defendant had, by some underhand means, obtained the allotment to him of the kraalsite occupied by the late Jim and taken possession of the materials thereon.

Defendant pleaded as follows:—

1. Defendant admits the allegations contained in paragraph 1 of the particulars of claim endorsed on plaintiff's counterclaim.
2. He denies the allegations contained in paragraph 2 and says that he, defendant is the heir, not plaintiff.
3. In regard to paragraph 3 defendant says that 2 of the cattle paid away were the property of his father and not the property of plaintiff, as alleged.
4. Defendant also denies the allegations contained in paragraph 4 save that he admits that he refuses to recognise plaintiff's rights.
5. In regard to paragraph 5 defendant denies that he obtained the kraal by underhanded means and says that an inquiry was held by the Magistrate of Elliotdale and plaintiff was ordered to leave the kraal, the Magistrate ruling that the kraal belonged to defendant.

Defendant therefore denies all liability in respect of plaintiff's counterclaim and prays for judgment in his favour in respect thereof, with costs.

After hearing evidence the Assistant Native Commissioner gave the following judgment:—

On the Counterclaim.

Washington Jim declared to be the heir of Jim Mahobe, claims 2, 3, 4 automatically being dismissed with costs.

Defendant has appealed against this judgment on the following grounds:—

1. That the evidence as to paternity and legitimacy given by Kate Poswa and Adolphus Mahobe should have been accepted by the Court as establishing Sampson Jim as heir to the late Jim Mahobe.
2. That the certificates of admission handed in by the parties were inadmissible and it was not competent for the Court to make a finding as to their accuracy.
3. That it was not competent for the Court to draw any adverse conclusions or doubts about plaintiff's evidence in general for the reason only that the Court had made adverse findings regarding the authenticity of the certificate handed in by plaintiff and which findings had been arrived at on slender and doubtful grounds.
4. That there is no substance in Law or Native Custom for the statement that as Jim "held Washington out as his son and it is considered that he and his successor's in title are estopped from proving the contrary, unless there is evidence of public repudiation as is demanded by Native Custom" and the Court erred in basing a findinng on this view of the law.

It is common cause that the late Jim Mahobe married Kate by Native Custom.

Adolphus Mahobe states that he is brother of the late Jim and was about 16 years of age when the customary union took place. He states that, at that time, defendant was a baby of about three months old but he does not know who his father was. Kate Poswa states that a man named Gadini Busakwe made her pregnant as a result of which she gave birth to defendant and, when he was three months old, she contracted a customary union with Jim Mahobe.

Kate Poswa tried to embellish her evidence by saying that she had caused defendant to be baptised and by producing a certificate of such baptism reflecting that he was baptised under

the name of Washington Nzunga. The Assistant Native Commissioner had reason for doubting the authenticity of this certificate but even if the evidence of Kate Poswa is rejected, there is still the uncontradicted evidence of Adolphus Mahobe that defendant was born before the customary union between Jim Mahobe and Kate took place.

In his plea, defendant denied that he was born to Kate before her marriage to Jim but has not brought any evidence in support of this denial. He has brought evidence to show that he was brought up as the son of Jim, that he was baptised as being the son of Kate and Jim, that he was circumcised from Jim's kraal, that he was registered for taxes in the name of Washington Jim, and that he was married from Jim's kraal.

The facts in this case are similar to those in the case of Ndondo *v.* Ndondo, 1944 N.A.C. (C. & O.), 80, in which it was held that, in regard to a child born before a marriage there is no presumption of paternity and none regarding legitimacy.

The onus was on defendant to prove that he was legitimate and this he has failed to do.

Plaintiff is entitled to a declaration that he is the heir of the late Jim Mahobe.

Plaintiff says that Jim Mahobe contributed six head of cattle to the dowry paid by defendant. The latter denies this and says that Jim Mahobe contributed two head, four head being cattle purchased with defendant's earnings. Plaintiff's evidence is vague and he does not describe the cattle, so I think that defendant's statement should be accepted.

It has not been shown why plaintiff is claiming a debate of account regarding Jim Mahobe's estate. In his evidence he says that he has possession of the assets in the estate, other than those claimed.

In regard to claim (3), the evidence is vague. Plaintiff says:— "I value the kraal at a total of £40. Fencing £3. 3 huts at £5 each. Netting wire £4. Stock kraal £1. Poles £4." He does not say how he arrived at these figures. According to defendant, a certificate was not issued to the late Jim Mahobe in terms of Proclamation No. 26 of 1936 in respect of this land. Plaintiff's evidence is silent on this point. By virtue of section *ten* of this Proclamation, if Jim Mahobe had had the right to occupy the allotment, plaintiff would have been entitled to remove the improvements within three months of his death, after which time no compensation is payable in respect thereof.

I consider that the appeal should be allowed with costs and the judgment of the Court below deleted and the following substituted:—

(1) For plaintiff as prayed in claim (1).

(2) For plaintiff for two head of cattle or their value £20.

(3) Absolution from the instance in regard to balance of claims.

(4) Defendant to pay costs.

Bates (Member): I concur.

Nel (Member): I concur.

For Appellant: Mr. Gray Hughes, Umtata.

For Respondents: Mr. Muggleston, Umtata.

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